

82-2003

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JUN 8 1983

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NO. \_\_\_\_\_

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1982

THE STATE OF TEXAS,  
TEXAS ALCOHOLIC BEVERAGE COMMISSION,  
W. S. McBEATH, ADMINISTRATOR, and  
LICENSED BEVERAGE DISTRIBUTORS  
ASSOCIATION,  
*Petitioners*

v.

UNITED STATES OF AMERICA,  
*Respondent*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

**PETITION FOR WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED FOR REVIEW**

1. Does a Department of Defense directive, by virtue of the Supremacy Clause, supercede, by implication, state law enacted pursuant to specific authority granted by the Twenty-first Amendment to the United States Constitution?
2. Does a Department of Defense directive authorize nonappropriated fund instrumentalities to secure the importation of alcoholic beverages into Texas in violation of state law in order to avoid state taxes the legal incidence of which falls on Texas suppliers rather than on federal instrumentalities?
3. Should a court of appeals be permitted to reverse a district court judgment upon the basis of assumed facts not in evidence and issues not presented to the trial court and to enter a decision based on an erroneous interpretation of an opinion of this Court?

## LIST OF PARTIES

### *PETITIONERS:*

The State of Texas, the Texas Alcoholic Beverage Commission, and W. S. McBeath, and

Licensed Beverage Distributors Association, whose members are:

- Accent Wine & Spirits
- American Wine
- Block Distributing Company
- Glazer Wholesale Drug
- Golman Wholesale Liquor Co., Inc.
- Key Distributors, Inc.
- Lone Star Company
- Longhorn Liquors, Ltd.
- McKesson Wine & Spirits
- Quality Beverage Company
- Schepps Wholesale Liquors
- Tarrant Distributors
- Terk Distributing Company
- White Rose

### *RESPONDENT:*

United States of America in behalf of the Department of the Navy, Consolidated Package Store, Beeville Naval Air Station and other nonappropriated fund instrumentalities.

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**OPINIONS BELOW**

The judgment sought to be reviewed is that of the Court of Appeals for the Fifth Circuit. The opinion is reported at 695 F.2d 137; it together with that court's judgment is reproduced in the Appendix hereto as item 1.

Petition for Rehearing and Suggestion of Rehearing En Banc were denied by per curiam Opinion and Order which is reproduced in the Appendix hereto as item 2.

The district court ruled for Petitioners. The Judgment and Memorandum Opinion and Order are reproduced in the Appendix hereto as item 3.

The Order of the district court denying summary judgment sought by the plaintiff, Respondent here, is reproduced in the Appendix hereto as item 4.

### **JURISDICTION**

The judgment of the Court of Appeals was entered on January 10, 1983. Petition for Rehearing and Suggestion of Rehearing En Banc, filed in conformity with the authority granted in Rules 35 and 40, Federal Rules of Appellate Procedure, and Local Rule 16 were denied by per curiam Opinion and Order entered on March 17, 1983. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Article VI, Clause 2 of the Constitution of the United States:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Section 2 of the Twenty-first Amendment to the Constitution of the United States:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

A general policy statement in Department of Defense Regulations, 32 C.F.R. § 261.4(c):

*"Cooperation.* (1) DOD will cooperate with all duly constituted regulatory officials (local, State and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this part. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price, and other factors considered."

Texas Alcoholic Beverage Code, Chapter 11, Provisions Generally Applicable to Permits, Section 11.01:

"(a) No person who has not first obtained a permit of the type required for the privilege exercised may, in a wet area, do any of the following:

(1) manufacture, distill, brew, sell, possess for the purpose of sale, import into this state, export from this state, transport, distribute, warehouse, or store liquor;

(2) solicit or take orders for liquor; or

(3) for the purpose of sale, bottle, rectify, blend, treat, fortify, mix, or process liquor.

“(b) A person may manufacture, distill, brew, sell, import, export, transport, distribute, warehouse, store, possess, possess for the purpose of sale, bottle, rectify, blend, treat, fortify, mix, or process liquor, or possess equipment or material designed for or capable of use for manufacturing liquor, if the right or privilege of doing so is granted by this code.

“(c) A right or privilege granted by this section as an exception to prohibitions contained elsewhere in this code may be exercised only in the manner provided. An act done by a person which is not permitted by this code is unlawful.”

Texas Alcoholic Beverage Code, Chapter 19, Wholesaler's Permit, Section 19.01:

“The holder of a wholesaler's permit may:

(1) purchase and import liquor from distillers, brewers, wineries, wine bottlers, rectifiers, and manufacturers who are holders of nonresident seller's permits or from their agents who hold manufacturer's agents permits;

(2) purchase liquor from other wholesalers in the state;

(3) sell liquor in the original containers in which it is received to retailers and wholesalers in this state authorized to sell the liquor; and

(4) sell liquor to qualified persons outside the state.”

Texas Alcoholic Beverage Code, Chapter 37, Non-Resident Seller's Permit (reproduced in the Appendix hereto as item 5).

Texas Alcoholic Beverage Code, Chapter 201, Liquor Taxes, in pertinent part:

“§ 201.02. ‘First Sale’ Defined

In this subchapter, ‘first sale’:

(1) as applied to liquor imported into this state by the holder of a wholesaler’s permit authorizing importation, means the first actual sale by the permittee to the holder of any other permit authorizing the retail sale of the beverage or to the holder of a local distributor’s permit; and

(2) as applied to all other liquor, means the first sale, possession, distribution, or use in this state.

“§ 201.03. Tax on Distilled Spirits

(a) A tax is imposed on the first sale of distilled spirits at the rate of \$2 per gallon. . . .

“§ 201.05. Reporting System

A person who holds a permit authorizing the importation of liquor into this state shall pay the liquor tax by the reporting system under bond.”

### STATEMENT OF THE CASE

Respondent on behalf of nonappropriated fund instrumentalities (hereafter NFIs) brought suit against the State of Texas, the Texas Alcoholic Beverage Commission and W. S. McBeath, Administrator (hereafter collectively the Texas ABC), seeking (1) declaratory judgment that NFIs operating on Naval bases in Texas are immune from state taxation and regulation and (2) injunctive relief prohibiting the Texas ABC from enforcing state law regulating the importation and sale of intoxicating liquors against any supplier who might sell to NFIs in violation of state law. Federal jurisdiction was invoked under 28 U.S.C. §§ 1345, 2201 and 2202 (I-R. 1-5).<sup>1</sup>

1. The abbreviations I-R, II-R and III-R designated the volumes of the original record.

Licensed Beverage Distributors Association, a trade association of wholesalers of alcoholic beverages, was permitted to intervene and aligned itself with the Texas ABC (I-R. 13, 31, 32-33)<sup>2</sup>

The issues were initially presented by Respondent's Motion for Summary Judgment (I-R. 34) and by affidavits, responses and briefs exchanged in connection therewith (I-R. 35-198). The trial court order denying the motion was based on *United States v. State Tax Commission of Mississippi*, 421 U.S. 599 (1975), which follows the rule that a tax is prohibited when the legal incidence of the tax falls on the federal government, but by distinguishing *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), reaffirms the corollary rule that a tax may be collected where the legal incidence falls on a supplier who is not required to pass the tax on to a federal purchaser. Respondent's motion was denied because the legal incidence of the Texas tax falls on the wholesaler who is not required to pass it on to any purchaser (Appendix item 4, A30).

Respondent moved for reconsideration, expressly contending that the case was "unlike *United States v. State Tax Commission*, 421 U.S. 599 (1975)" (I-R. 202-203), and urging the Supremacy Clause as making the NFIs and their suppliers totally immune from any state taxation or regulation (I-R. 204-216). The motion for reconsideration was denied (I-R. 245).

The trial opened with Respondent's asserted reliance on the Supremacy Clause. In response to the question,

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2. The State of Texas, the Texas Alcoholic Beverage Commission and W. S. McBeath, Administrator, are also petitioning for writ of certiorari. The contentions advanced in that petition are basically the same as those incorporated herein so that the two petitions may appropriately be considered together.

"Where is the conflict?" asked by the court, the attorney for Respondent answered (III-R. 9):

"The conflict is between the Texas regulations which purport to require the Texas regulators to govern the flow of alcoholic beverages into the state and . . . to make sure that all those beverages are imported by license holders<sup>3</sup> . . . and [the federal] regulation . . . requiring them [the NFIs] to purchase beverages at the lowest price possible."<sup>4</sup>

Following trial during which Respondent's evidence was directed toward its inability to circumvent the Texas gallonage tax (III-R. 20-21, 40, 44, 48, 57, 69, 89-90), the court issued a memorandum opinion and order concluding that (Appendix item 3, A24-25):

"After careful consideration, the Court is of the opinion that there is no apparent conflict between the federal regulation and the state regulations in question, other than the conflict fabricated by the Plaintiff and its instrumentalities for the purposes of this suit.<sup>5</sup> The United States and its various instrumentalities shall henceforth comply with its own regulation, concerning the procurement of alcohol and seek

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3. Such regulations are clearly authorized by Section 2 of the Twenty-first Amendment.

4. The words actually used in the directive are "the most advantageous contract, price and other factors considered."

5. The Frank-Lin incident discussed in the opinion in question (Appendix item 1, A6) is the "fabricated" conflict to which the court referred. The order which was placed more than two years after suit had been filed listed only generic names (III-R 107). Respondent's initial witness testified that he could not successfully use generic brands because naval personnel wants brand names (III-R. 62, 63, 74, 83, 84), but Frank-Lin was "one of the few firms we could find that was willing to ship into the State of Texas" (III-R. 70). The store had ordered only two cases of vodka, two cases of gin, two cases of bourbon and two cases of Scotch (III-R. 120).

the 'most advantageous contract' which includes the best price available within the confines of compliance with the state regulatory scheme which is certainly the most important 'other factor' to be considered."

There was no evidence that Texas had ever asserted any claim against the NFIs. The Texas ABC does not attempt to require the NFIs to secure permits. No claim for taxes has ever been made against them (III-R. 51, 87, 155). No charges of violation have been brought against any NFI. The only action shown was taken with regard to the state's own permittees. The undisputed position of the Texas ABC was that "there's nothing that the State of Texas can do to someone who does not hold a permit" (III-R. 129-130). The district court, therefore, denied the relief sought (Appendix item 3, A16).

The Court of Appeals reversed by presuming facts not supported by evidence and determining issues not raised in the trial court as basis for assuming to follow its own—and, it is respectfully submitted, erroneous—interpretation of the *State Tax Commission of Mississippi* case which had been expressly disavowed by Respondent's attorney at the trial court level.

### ARGUMENT: REASONS FOR GRANTING THE WRIT

The strongest reason for granting the writ is that the opinion below is in conflict with *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), the decision upon the basis of which the district court initially ruled against Respondent (Appendix item 4, A30). Conflict is fully developed below as the third reason for granting writ because the compelling effect of that reason is increased when it is viewed in the light of other cir-

cumstances which also constitute meritorious reasons for granting the writ.

# I.

**The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.**

Every ruling made in the opinion here in question is based on assumed facts without support in evidence. Apparently as a basis for disregarding the particular rulings made by the district court, the Court of Appeals assumed that the Naval bases involved had been "purchased by Consent of the Legislature of the State" and are held under the authority of Article I, Section 8, Clause 17 of the United States Constitution. The opinion even cites the constitutional provision (Appendix item 1, A11, ftn. 8), but there was not a shred of evidence relating to federal jurisdiction over any base in Texas. Respondent as appellant below conceded that the trial court record "does not reflect whether the Navy's bases in Texas are 'exclusive' or 'concurrent' jurisdiction bases."<sup>6</sup> Neither alternative must necessarily be accepted as true. A "state may refuse its consent and retain jurisdiction consistent with the governmental purposes for which the property was acquired" by the federal government. In "cases of acquisition by purchase without consent of the State, jurisdiction is dependent upon cession by the State."<sup>7</sup> The record in the case at bar does not even show that title to the bases is in the federal government.

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6. Brief for Appellant, 29, ftn. 11.

7. *James v. Dravo Contracting Co.*, 302 U.S. 134, 147 (1937).

Nevertheless, the Court of Appeals heads its major discussion of issues, "EXCLUSIVE ZONE OF FEDERAL JURISDICTION" (Appendix, item 1, A8). Whether the United States has acquired exclusive jurisdiction is a federal question.<sup>8</sup> The question was not even suggested at the trial court level, but the Court of Appeals obviously assumed to decide it.

The established rule is that "A federal appellate court does not consider an issue not passed upon below."<sup>9</sup> Although exceptions to the rule exist, there is no lawful justification for the violation presented in the case at bar.

The error in deciding the issue which had not been presented to the district court is compounded because determination that the naval bases are under either "exclusive" or "concurrent" federal jurisdiction caused the Court of Appeals to refuse to consider the legal incidence of the tax which was the controlling factor in the district court's rulings against Respondent (Appendix item 3, A20 and item 4, A30) and which, as will be shown below, was also the controlling factor in this Court's ultimate ruling in the Mississippi cases which the court below purported to follow. The Court of Appeals, however, expressly refused to consider the issue. It stated that (Appendix item 1, A4, fn. 1):

"The State of Texas argues vigorously that its gallonage tax falls upon the wholesaler and not the government, and that the gallonage tax is a method of defraying the costs of regulation rather than producing revenue. *Because our analysis turns on the proposition that the state may not, in any manner,*

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8. *Paul v. United States*, 371 U.S. 245, 267 (1963); *Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 197 (1937).

9. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

*regulate the distribution or consumption of alcoholic beverages on a federal enclave in the absence of an agreement between it and the federal government, we find no need to pass upon the validity of these arguments."* (Emphasis added.)

The court could not reasonably have determined the tax issue contrary to the state's contentions in view of the fact that during trial Respondent's attorney offered "to stipulate that the legal incidence of the Texas tax is on the wholesaler" (III-R. 152). Nevertheless, the court's own words, quoted above, make it abundantly clear that the "analysis"—actually the entire decision—rested upon the determination of an unrepresented issue on the basis of factual assumptions for which there is no support in record evidence. That was a clear departure from normal accepted appellate review.<sup>10</sup> It is ironic that the court went to such an extreme to reach a determination which, as will be shown below, was not controlling in the decision the court assumed to follow. That circumstance, however, increases rather than lessens the gravity of the court's disregard of established appellate procedure. Certiorari should be granted because the decision below constitutes a threat to the goal of uniformity of federal procedure, *Hianna v. Plumer*, 380 U.S. 460 (1965).

## II.

### **The Court of Appeals has misconstrued and improperly applied decisions of this Court.**

The only logical explanation for the Court of Appeals' *sua sponte* determination that the naval bases are in an

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10. Even if Respondent as appellant below had attempted to raise the issue on appeal—which it did not—the court should have refused to consider it under the holding made in *United States ex rel Huisinga v. Commanding Officer*, 446 F.2d 124, 125 (8th Cir. 1971), and authorities there cited.

"EXCLUSIVE ZONE OF FEDERAL JURISDICTION" is the desire to make applicable to the case then before it this Court's decisions in *United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973), and *United States v. State Tax Commission of Mississippi*, 421 U.S. 599 (1975). In the Mississippi situation "exclusive" and "concurrent" jurisdiction had been established at the initial district court trial.<sup>11</sup> The nature of jurisdiction under Article I, Section 8, Clause 17, was discussed in this Court's earlier opinion (412 U.S. 369), but the nature of the there established federal jurisdiction resulted only in remand in the first case and was totally without controlling effect in the second.

The basic issue in both cases was the state's right to collect a "markup" from distillers and others who might sell directly to military installations. In the earlier case this Court, after pointing out that under Mississippi law the state was the sole authorized importer of alcoholic beverages, further explained that (412 U.S. 365):

"Under the authority granted to it by the Act, the Tax Commission promulgated Regulation 25 which gives military post exchanges, ship's stores, and officers' clubs the option of purchasing liquor either from the Commission or directly from the distiller. However, insofar as purchases are made directly from the distillers by such military facilities, the regulation requires the distiller to collect and remit to the Tax Commission the latter's 'usual wholesale markup.' During the period involved in this case, the Tax Commission's wholesale markup was 17% on distilled spirits and 20% on wine."

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11. *United States v. State Tax Commission of Mississippi*, 340 F.Supp. 903, 904 (S.D. Miss. 1972, vacated and remanded).

The district court had sustained Mississippi's defense that the Twenty-first Amendment granted it the right to collect the markup, but this Court found that the court below had erred "in concluding that the Twenty-first Amendment provides the state with sufficient authority over liquor transactions to support the application of the Regulation to the two bases over which the United States exercises exclusive jurisdiction" (412 U.S. 363, 368). That holding was made on the basis of this Court's finding that the markup was an invalid attempt by the state to fix prices at which merchandise could be sold in an area of exclusive federal jurisdiction.<sup>12</sup> Judgment was not rendered on the basis of that holding. Instead the entire case was remanded for further consideration by the district court in part because as an alternative defense in this Court, Mississippi contended that the markup

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12. The ruling was based on *Pacific Coast Dairy, Inc. v. Dept. of Agriculture*, 318 U.S. 285 (1943), and *Paul v. United States*, 371 U.S. 245 (1963), both of which held invalid attempts by California to enforce minimum milk price regulations in areas of exclusive federal jurisdiction. It was not and could not have been contended that Texas has ever purported to fix prices. The Court of Appeals did not find that Texas had engaged in price fixing so the case at bar could not reasonably have been found to be controlled by the only definitive ruling in the first Mississippi case, but as a basis for purporting to follow that decision, the court below wrote, "A major premise of the district court's analysis was its assumption that the State of Texas has the requisite jurisdiction by virtue of the Twenty-first Amendment, to impose its legislative will upon federal enclaves located within the State" (Appendix item 1, A10). That is a blatant misstatement. The district court's express holding was that, "The State of Texas makes no pretense toward regulating alcoholic beverages once they reach a federal enclave" (Appendix item 3, A21). Moreover, because it found that Respondent had failed to establish any conflict, the district court saw "no necessity to reach the Constitutional issue posed" by the Twenty-first Amendment (Appendix item 3, A19).

should be viewed as a sales tax authorized by the Buck Act, 4 U.S.C. §§ 105-110. The issue was not decided.<sup>13</sup>

On remand the district court again sustained the markup with regard to sales made to installations, both those over which the federal government had "exclusive" jurisdiction as well as those over which the federal government's jurisdiction was "concurrent."<sup>14</sup> Specifically the court found that the markup was a sales tax authorized by the Buck Act and that the legal incidence of the tax did not fall on the federal government.<sup>15</sup>

On the second appeal this Court approved the district court's holding that "the markup constitutes a tax on the purchases made by the nonappropriated fund activities from out-of-state suppliers" (421 U.S. 606) but further found that the Mississippi tax was substantially identical with one considered in a previous case from which it quoted the holding that (421 U.S. 607):

"The statute directed that 'each vendor in this commonwealth *shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed . . .*'" (Emphasis by this Court.)

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13. In marked contrast with the manner in which the Court of Appeals here decided unpresented issues, this Court remanded, pointing out that "Whether the markup should be treated as a tax on sales occurring within a federal area within the meaning of § 105(a), see also 4 U.S.C. § 110(b), and, if so, whether the exception contained in § 107(a) nevertheless serves to remove the markup from the consent provision for purposes of the two exclusively federal enclaves are issues which the record reveals were never considered, much less decided, by the District Court. . . . we think that these additional issues are appropriately left for determination by that court in the first instance on remand." (412 U.S. 379).

14. *United States v. State Tax Commission of Mississippi*, 378 F.Supp. 558, 561-573 (S.D. Miss. 1974, reversed).

15. *Ibid.*, 562, 566.

In the earlier case<sup>16</sup> this Court had found that where the law requires that the vendor pass on the tax to the purchaser, the legal incidence of the tax falls on the purchaser rather than on the vendor. After referring to other cases with comparable holdings, this Court continued (421 U.S. 611):

*"... We held that the statute, by requiring the passing on of the tax and its collection from the purchaser, placed the legal incidence of the tax on the purchaser.*

*"We hold, therefore, that viewing the markup as a sales tax, the legal incidence of that tax was intended to rest upon instrumentalities of the United States."* (Emphasis added.)

The other holdings in the case were that Section 7(a) of the Buck Act is "an explicit congressional preservation of federal immunity from state sales *taxes*" (421 U.S. 612, emphasis added) and that the Twenty-first Amendment did not "abolish federal immunity with respect to *taxes* on sales of liquor" (421 U.S. 613, emphasis added).

The Mississippi case involved sales to military organizations on bases over which the federal government has either "exclusive" or "concurrent" jurisdiction, but this Court's second decision where it was finally determined that the markup could not validly be collected is in no way grounded on the existence of either "exclusive" or "concurrent" jurisdiction over the bases. Instead, the opinion as a whole makes it abundantly clear that the determinative conclusion was that the Mississippi markup was a tax the legal incidence of which necessarily fell on the

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16. *First Agricultural National Bank v. Tax Commission*, 392 U.S. 339 (1968).

federal government because of the requirement that the seller add the markup to the price and collect it from the purchaser. Every holding in the case is a tax holding based on the rule that the federal government is immune from direct taxation by the state. The Mississippi markup was direct taxation because the legal incidence of the tax fell on the federal instrumentalities. The nature of jurisdiction over the bases in Mississippi was simply an incidental fact mentioned in the opinion but totally without controlling effect on any ruling made.

The Court of Appeals recognized that in the second *Mississippi* case this Court had concluded "that the legal incidence of Mississippi's markup was on the United States" (Appendix, item 1, A12), but as noted above, it found "no need to pass upon" the state's argument that the legal incidence of the Texas tax falls on the wholesaler—not on the purchaser (Appendix, item 1, A4, fn. 1). The case at bar could not have been found to be controlled by this Court's holdings in the Mississippi case that the legal incidence of the tax fell on the federal instrumentalities. The evidence here is undisputed that the Texas tax is imposed on wholesalers who are not required to pass the tax on to purchasers (III-R. 148-150). Respondent's own major witness testified that the invoices from Texas wholesalers do not include any figure which could represent a direct tax on the federal government (III-R. 87) and that the military could be considered to be only "indirectly paying" the tax (III-R. 90). Respondent's trial attorney had expressly stated that this "is not a tax case" and is "unlike" the Mississippi case (I-R. 203-204). He had also offered "to stipulate that the legal incidence of the Texas tax is on the wholesaler" (III-R. 152).

Neither *Mississippi* case supports any ruling made below. Mississippi law expressly authorized the military to order from out-of-state suppliers but required the suppliers to add the fixed markup to the prices which they charged the military. In its first decision this Court found that the requirement was invalid as an attempt to fix prices on goods sent from outside the state to the two bases over which there was exclusive federal jurisdiction because nothing occurred within the state to give it regulatory authority (412 U.S. 371). No comparable facts were established here, but it is of far greater importance that the Texas statutes which the court below would make inoperative are not even remotely similar to the Mississippi requirement. The nature of federal jurisdiction was in no way a factor in the second, really determinative Mississippi decision. Instead the express basis of every holding there made was the determination that the Mississippi markup was a tax the legal incidence of which fell on the federal government. Although the Court of Appeals appeared to do so, this Court's determination of that basic issue cannot be dismissed as lacking pertinence. It is unthinkable that this Court would devote six pages of its opinion (421 U.S. 605-611), cite more than half a dozen decisions, and write four explanatory footnotes on an issue which was not essential to its decision.

By presuming to interpret the Mississippi rulings as having been made on the basis of "exclusive" and "concurrent" jurisdiction and assuming without any supporting evidence that the same situation with regard to federal jurisdiction exists in Texas, the Court of Appeals was clearly grasping at straws to reverse the district court judgment. Certiorari should be granted to correct the Court of Appeals' misconstruction and misapplication of this Court's holdings.

## III.

The Court of Appeals opinion conflicts with a controlling decision of this Court with regard to the validity of a state tax on products sold to federal instrumentalities for sale on federal enclaves and is contrary in principle with the rules consistently followed by this Court in tax determinations.

The opinion below can be construed only as holding that state taxes cannot be collected on alcoholic beverages (or presumably any other product) sold to military facilities on bases over which the federal government has either "exclusive" or "concurrent" jurisdiction regardless of whether or not the legal incidence of the state tax falls on the federal government. This Court did not so hold in the *Mississippi* cases. To the contrary, this Court clearly reaffirmed an earlier holding that if the legal incidence of the tax does not fall on the federal government, the tax may validly be imposed on products sold to military facilities on bases even where the federal government has "exclusive" jurisdiction. The first *Mississippi* decision (412 U.S. 363, 371) cites *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), as showing a situation in contrast with the one then before this Court. The same case was completely distinguished in the second decision where this Court explained that (421 U.S. 610, fn. 9):

"*Polar Co. v. Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389 (1964), relied upon by appellees, is not contrary. That case involved a Florida tax upon the seller's activity of processing or bottling milk for sale on enclaves over which the Federal

Government exercised *exclusive jurisdiction*. The tax was not a sales tax and *there was no requirement that the amount of the tax be passed on to the federal purchasers*. See also *Gurley v. Rhoden*, 421 U.S. 200, 95 S.Ct. 1605, 44 L.Ed.2d 110 (1975), holding that the legal incidence of federal and state excise taxes on gasoline was on the producer-distributor of the gasoline who was not required to pass on the amount of the tax to his purchasers. And see *American Oil Co. v. Neill*, 380 U.S. 451, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965); *Norton Co. v. Department of Revenue*, 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517 (1951)." (Emphasis added.)

As shown by the Texas statutes imposing tax on alcoholic beverages, appropriately set out in an opening section of this petition, the Texas gallonage tax is clearly comparable with the Florida tax which was before the Court in the *Polar* case. It was there pointed out that (375 U.S. 381):

"Polar challenges that provision of the Florida Milk Control Act which imposes a tax in the amount of 15/100 of 1 cent upon each gallon of milk distributed by a Florida distributor. To the extent the computation of the tax includes milk which it sells to Fort Benning, Tyndall Air Force Base, and the Pensacola Naval Air Station, all being *federal enclaves* over which the United States exercises *exclusive jurisdiction*, Polar argues that the taxing measure is invalid as beyond the jurisdiction of the State to impose. We do not agree." (Emphasis added.)

The nature of the tax rather than enclave status was the controlling factor. In distinguishing cases relied upon as supporting the contention of invalidity of the tax, this Court further explained that (375 U.S. 382):

"In these cases the tax was deemed to fall upon the facilities of the United States or upon activities conducted within these facilities, the principle of both cases being that there was nothing occurring within the State, beyond the borders of the federal enclave, to which the tax could attach. Contrariwise, the Florida tax is on the privilege of engaging in the business of distributing milk or acting as a distributor."

In stating a position diametrically conflicting with that taken by the court below in the case at bar, this Court also held that (375 U.S. 382, fn. 12):

"It may be that the economic burden of the tax ultimately falls upon purchasers of Polar's milk, including the United States. Decisions of this Court make clear, however, that the fact that the economic burden of a tax may fall on the Government is not determinative of the validity of the tax."

The court below refused to consider the nature of the Texas gallonage tax and, instead, based its ruling on unestablished but assumed existence of either "exclusive" or "concurrent" federal jurisdiction which was found to preclude collection of the tax regardless of whether or not the legal incidence of the tax fell on the federal government. Exclusive federal jurisdiction was established in *Polar* but did not result in prohibition of the collection of the Florida gallonage tax. The opinion below, therefore, is in clear and diametric conflict with this Court's decision in *Polar* which was clearly reaffirmed in the *Mississippi* case. This Court there similarly reaffirmed *Gurley v. Rhoden*, 421 U.S. 200 (1975), decided at the same term and also cited in the *Mississippi* case.

In *Gurley* this Court defined its "task" as being "to determine upon whom the legal incidence of each tax rests" (421 U.S. 204). That the controlling issue in making that determination was whether or not the statute required that the tax be passed on to the purchaser is made abundantly clear by the holding that (421 U.S. 204):

"The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise. Therefore, *the decision as to where the legal incidence of either tax falls is not determined by the fact that petitioner, by increasing his pump prices in the amounts of the taxes, shifted the economic burden of the taxes from himself to the purchaser-consumer.* The Court has laid to rest doubts on that score raised by such decisions as *Panhandle Oil Co. v. State of Mississippi ex rel. Knox*, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928); *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 51 S.Ct. 601, 75 L.Ed. 1277 (1931); and *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 74 S.Ct. 403, 98 L.Ed. 546 (1954), at least under taxing schemes, as here, *where neither statute required petitioner to pass the tax on to the purchaser-consumer.*" (Emphasis added.)

The same rules were followed in determining the "legal incidence" of the taxes involved in the two other cited cases, *American Oil Co. v. Neill*, 380 U.S. 451 (1965), and *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951). Clearly the opinion below is in conflict with this Court's decision in the *Polar* case and inconsistent with the principles followed in a multitude of other cases wherein the question of the validity of a state tax was decided by determining whether or not the legal incidence

of the tax fell on the purchaser. That was the procedure which this Court followed in the *Mississippi* case but which the court below deliberately refused to apply. Certiorari should be granted to resolve the conflict.

#### IV.

**The Court of Appeals opinion conflicts with the principles followed by this Court in Supremacy Clause cases involving the Twenty-first Amendment.**

The court below has held the Texas statutes controlling the importation of alcoholic beverages into the state are, by virtue of the Supremacy Clause, superseded by a Department of Defense directive specifying that the military shall cooperate with state and local authorities and purchase alcoholic beverages "in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price, and other factors considered (*supra*, 3). In contrast, this Court in its most recently reported opinion involving the Twenty-first Amendment, *Rice v. Norman Williams Co.*, \_\_\_\_ U.S. \_\_\_\_, 102 S.Ct. 3294 (1982), followed and reaffirmed its earlier decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, where it was pointed out that (384 U.S. 41-42):

"Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' As this Court has consistently held, 'That Amend-

ment bestowed upon the states broad regulatory power over the liquor traffic within their territories.' ”

That case had been brought by distillers and importers who attacked a New York affirmation statute requiring them to file monthly statements that the prices they charged wholesalers in New York were no higher than the lowest prices at which sales were made elsewhere in the United States. The contention was that the statute was violative of several constitutional provisions and the federal antitrust laws. In upholding the statute, this Court pointed out that (384 U.S. 45):

“In this as in other areas of coincident federal and state regulation, the ‘teaching of this Court’s decisions \* \* \* enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.’ *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446, 80 S.Ct. 813, 817, 4 L.Ed.2d 852.”

That rule was repeated in the *Rice* case<sup>17</sup> where this Court reversed a state court opinion holding invalid a California designation statute. The California court had assumed to follow *California Retail Liquor Dealers v. Mid-Cal Aluminum*, 445 U.S. 97 (1980), which affirmed a state court decision holding invalid a price fixing statute.<sup>18</sup> In *Rice*, however, this Court distinguished the

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17. \_\_\_\_ U.S. \_\_\_\_, 102 S.Ct. 3301.

18. This Court held that the price fixing statute could not be sustained either as a state action exemption to the antitrust laws or as an exercise of state authority under the Twenty-first Amendment because the act served no legitimate state purpose and because it could not be defended by “unsubstantiated state concerns” of promoting temperance and orderly market conditions (445 U.S. 106-114).

*Mid-Cal* case and found the designation statute to be more nearly comparable with the affirmation statute upheld in *Seagram* because "the designation statute is rationally related to the statute's legitimate purposes."<sup>19</sup>

The approach taken in the opinion below is in marked contrast with that taken by this Court in the decisions discussed above. There is even greater contrast with *National Railroad Passenger Corporation v. Miller*, 358 F.Supp. 1321 (D.C.Ka. 1973), affirmed without written opinion 414 U.S. 948 (1973). In that case the plaintiff's Supremacy Clause contention was based on a provision in the Rail Passenger Act which, on its face, appeared to control over state law. As quoted in the opinion, 45 U.S.C. § 546(c) provided that (358 F.Supp. 1328):

"The Corporation shall not be subject to any State or other law pertaining to the transportation of passengers by railroad as it relates to rates, routes, or service."

On the basis of that provision the plaintiff contended that serving liquor to passengers was a "service" and that the federal statute, as enacted by Congress, in express terms preempted state law insofar as the operation of the train was concerned.<sup>20</sup> Clearly comparable, but even more

19. \_\_\_\_ U.S. \_\_\_\_, 102 S.Ct. 3302. There is an abundance of evidence that the Texas statutes regulating nonresident sellers serve legitimate state purposes of insuring quality, purity and label conformity and the enforcement of other provisions in the Texas Alcoholic Beverage Code (III-R. 123-125, 153-156, 163-165, 171-176). Respondent's trial attorney agreed that the Texas program has "purpose and effect" (III-R. 176). Comparable state purposes resulted in this Court's upholding state regulatory authority under the Twenty-first Amendment in *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275 (1972).

20. The directive urged by Respondent here does not even purport to free the military from operation of state law.

far-fetched, is Respondent's contention here that the ambiguous Department of Defense directive with regard to "most advantageous contract" supersedes state law regulating importation of alcoholic beverages insofar as federal instrumentalities are concerned. The three-judge court refused to adopt plaintiff's argument in the reported case and instead held that (358 F.Supp. 1329):

"But before a federal law may preempt state legislation the federal statute must be free from constitutional infirmity. Constitutional amendments limit the power of Congress as well as that of the states when so considered. A construction of 45 U.S.C. § 546(c) which would forbid or prevent the enforcement of a state's regulatory liquor law under the guise of classifying the use and sale of liquor-by-the-drink as a 'service,' if so construed, would amount to a circumvention of the clear provisions of the second section of the Twenty-First Amendment. There is nothing in the legislative history of the amendment, nor in the enactment of the Rail Passenger Service Act, to justify such interpretation and such an effort, had it been attempted, would be a clear violation of the Twenty-First Amendment."

Since, as the court there held, not even an act of Congress could prevent enforcement of a state's regulatory liquor law enacted under the authority granted by the Twenty-first Amendment, it must necessarily follow that a Department of Defense directive cannot constitutionally deprive Texas of its right to regulate the importation of alcoholic beverages under the authority granted by the Twenty-first Amendment.<sup>21</sup>

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21. Since the three judge court decision in the cited case was affirmed without written opinion, it is subject to this Court's directive that "lower courts are bound by summary decisions of this Court until such time as the Court informs them they are not," *Hicks v. Miranda*, 422 U.S. 332, 344-345 (1975).

## V.

**The importance of the case merits the granting of certiorari.**

Both procedurally and substantively the opinion below is out of line and inconsistent with holdings of this Court. There is clear conflict with *Polar*, and the lower court's summary refusal to consider tax consequences (Appendix item 1, A4, fn. 1) conflicts with the principles long followed by this Court with regard to the validity of state taxation of those working for or with the federal government.<sup>22</sup> The disregard of the state's right to control non-resident sellers (suppliers of alcoholic beverages imported into the state) conflicts in principle, if not directly, with this Court's decision in *Seagram* and constitutes at least a collateral attack on primary American source laws which the United States Attorney General's office expressly sanctioned in an amicus brief in the *Rice* case.<sup>23</sup> The manner in which the court below utilized the Supremacy Clause to invalidate state law violates the constitutional concept of the "existence of the states functioning in coordination with the national government" to which

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22. *United States v. County of Fresno*, 429 U.S. 452, 459-462 (1977), and authorities there cited. "The rule to be derived from the court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional as long as the tax is imposed equally on the other similarly situated constituents of the State." See also *United States v. New Mexico*, 455 U.S. 270 (1982), and *Washington v. United States*, No. 81-969, March 29, 1983, 51 L.W. 4305.

23. "A primary source law . . . requires a particular method of distribution and therefore more clearly reflects articulated state interests of the kind that may be given appropriate weight under the 'state action' exemption and the Twenty-first Amendment." (Brief for the United States as Amicus Curiae, 20, fn. 18, included here at II-R. 366).

this Court has long adhered<sup>24</sup> as well as its repeated injunctions against seeking out conflict where none exists.<sup>25</sup> The disregard of the record and the issues presented—or not presented—to the district court invokes the exercise of this Court's supervisory authority.

### PRAYER

For each and all of the reasons set forth above, Petitioner Licensed Beverage Distributors Association prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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24. *Penn Dairies v. Milk Control Commission*, 318 U.S. 261 (1943).

25. *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978), reh. den. 439 U.S. 884 (1978).

**CERTIFICATE OF SERVICE**

I, Mary Joe Carroll, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari on counsel for Respondent by depositing the same in the United States Mail, postage prepaid, addressed to:

Mr. Michael L. Paup  
Mr. Steven I. Frahm  
Attorneys, Tax Division  
Department of Justice  
Washington, D.C. 20530

Mr. Edward C. Prado  
United States Attorney  
655 E. Durango Blvd.  
San Antonio, Texas 78206

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MARY JOE CARROLL

A1

**APPENDIX**

**Item 1**

UNITED STATES COURT OF APPEALS  
For The Fifth Circuit

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No. 81-1597

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D. C. Docket No. A-79-CA-79

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UNITED STATES OF AMERICA  
Plaintiff-Appellant,

versus

THE STATE OF TEXAS, ET AL.,  
Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas

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Before BROWN, GEE and JOLLY, Circuit Judges.

**J U D G M E N T**

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

A2

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

January 10, 1983

ISSUED AS MANDATE:

UNITED STATES of America,  
Plaintiff-Appellant,

v.

The STATE OF TEXAS, Texas Alcoholic Beverage  
Commission and W. S. McBeath, as Administrator  
of the Texas Alcoholic Beverage Commission,  
Defendants-Appellees.

No. 81-1597

UNITED STATES COURT OF APPEALS  
Fifth Circuit.

Jan. 10, 1983.

United States brought suit against the State of Texas seeking a declaratory judgment that Texas Alcoholic Beverage Code provision requiring nonresident sellers of alcoholic beverages to sell only to wholesale permit holders was unconstitutional as applied to purchases of alcoholic beverages by nonappropriated fund instrumentalities of the Department of the Navy located in Texas. The United States District Court for the Western District of Texas, Jack Roberts, J., held that the provision was constitutional, and the United States appealed. The Court of Appeals, Gee, Circuit Judge, held that the provision was unconstitutional under the supremacy clause.

Reversed.

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Appeal from the United States District Court for the  
Western District of Texas.

Before BROWN, GEE and JOLLY, Circuit Judges.  
GEE, Circuit Judge:

### INTRODUCTION

The Texas Alcoholic Beverage Code incorporates a three tiered regulatory scheme embracing (1) nonresident sellers, (2) resident wholesalers and (3) resident retailers of distilled alcoholic beverages. Each is required to obtain a permit for the activity to be conducted. Tex. Alco. Bev. Code Ann, § 11.01(a) (Vernon 1978). Nonresident sellers may sell only to wholesale permit holders authorized to import alcoholic beverages into Texas. *Id.* §§ 19.01, 20.01, 37.01. In turn, these wholesale permit holders sell to resident retailers, designated under the code as package store permit holders. *Id.* § 22.01. In addition to this tiered regulatory scheme, the code requires wholesale permit holders to pay a tax of \$2 for each gallon of distilled spirits sold.<sup>1</sup> *Id.* § 201.03(a).

At some point during the winter of 1978, several non-appropriated fund instrumentalities<sup>2</sup> (NFIs) of the Department of the Navy concluded that the Department of Defense's alcohol procurement regulation, 32 C.F.R.

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1. The State of Texas argues vigorously that its gallonage tax falls upon the wholesaler and not the government, and that the gallonage tax is a method of defraying the costs of regulation rather than producing revenue. Because our analysis turns on the proposition that the state may not, in any manner, regulate the distribution or consumption of alcoholic beverages on a federal enclave in the absence of an agreement between it and the federal government, we find no need to pass upon the validity of these arguments.

2. A nonappropriated fund instrumentality is not supported by direct government funding. NFIs are expected to support military recreational activities through the generation of profits, by virtue of the sale of alcoholic beverages or otherwise. The NFIs in question are located at the Navy's air stations in Corpus Christi, Kingsville and Beeville, Texas.

§ 261.4(c),<sup>3</sup> permitted the importation of alcoholic beverages directly from nonresident sellers, notwithstanding their designation as package store permit holders under the code. The Texas Alcoholic Beverage Commission (TABC) disagreed with this reading of section 261.4(c) and expressly forbade nonresident sellers from selling directly to the NFIs.

In a bulletin sent to all wholesalers and nonresident sellers on January 30, 1978, the TABC warned of its readiness to take legal action to prevent circumvention of the gallonage tax on the military's procurement of alcoholic beverages. A similar bulletin was issued on July 10, 1978, indicating that any attempts by nonresident sellers to avoid the gallonage tax by delivering direct orders to the military would be vigorously challenged. In particular the bulletin noted that "any deliberate violation of the law is unquestionably a ground for cancellation of permits."<sup>4</sup> On this same date the TABC initiated pro-

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3. In pertinent part, 32 C.F.R. § 261.4(c) provides:

(1) DOD will cooperate with all duly constituted regulatory officials (local, State and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this part. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price, and other factors considered.

4. The bulletin, dated July 10, 1978, in its entirety reads as follows:

On January 30, 1978, this agency issued a statement with regard to its position on sales to military installations. At that time it was anticipated that an attempt might be made by one or more purchasers for a military instrumentality to avoid the Texas gallonage tax by some sort of direct order to a wholesaler or non-resident seller. Information received indirectly indicates that such an attempt will be made within the near future.

The purpose of this letter is to remind you that the Alcoholic Beverage Commission will vigorously challenge any attempt to cir-

ceedings against Frank-Lin Distillers of San Jose, California, for the "unauthorized" delivery of alcoholic beverages to an NFI located at Chase Field, Beeville, Texas.<sup>5</sup>

On April 23, 1979, the United States instituted suit in the Western District of Texas seeking a declaratory judgment that the Texas regulatory scheme, as applied to purchases of alcoholic beverages by the NFIs, was unconstitutional. Specifically, the government urged that the alcohol procurement procedure described in 32 C.F.R. § 261.4(c), *see n. 3 supra*, by virtue of the Supremacy Clause of the United States Constitution, art. VI, cl. 2, exempted NFIs from compliance with Texas' regulatory procedures. The district court reasoned that the Supremacy Clause would be implicated and such an exemption would occur only if the two sets of legislation posed an irreconcilable conflict. *See Department of Alcoholic Beverage Control v. Williams*, \_\_\_\_ U.S. \_\_\_\_, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982). Finding that the federal and state regulations could coexist without violence to either, the district court concluded that the Alcoholic Beverage Code was constitutional as applied to the NFIs.

[1] For the reasons stated below, we find that the district court was mistaken in its application of the Supremacy Clause and its attendant preemption principles. Accordingly, we reverse its judgment.

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cumvent the Texas gallonage tax. The statutory law of Texas is entirely different and distinguishable from the controlling provisions in Mississippi and Louisiana where the courts have authorized tax-free sales to the military. This agency is bound and controlled solely by the laws of the State of Texas which it has the duty to enforce. Any deliberate violation of the law is unquestionably a ground for cancellation of permits.

5. As a result of this delivery Frank-Lin's license was suspended for seven days.

## THE ANALYTICAL FRAMEWORK

[2] It is beyond peradventure that the Supremacy Clause of the United States Constitution is implicated only where Congress exercises a granted power. *See* U.S. Const. amend. X. Within these limited contours federal law will preempt the operation of any corresponding state legislation where there is an actual conflict between the two sets of legislation such that both cannot stand. *See Williams, supra*. This general rule is more easily stated than applied. In consequence, courts have employed a two-tier analytical framework to determine the applicability and effect of the preemption doctrine in a given case.

[3, 4] The threshold consideration of the traditional analysis is one of jurisdiction. Here, the relevant inquiry is whether the subject matter at issue is within the exclusive domain of the federal government. If it is purely a federal concern, the Supremacy Clause preempts all state regulation that would vitiate the impact or intent of the federal regulatory scheme.<sup>6</sup> In determining whether the federal government occupies a zone of exclusive authority it is necessary to look beyond the facial implications of the issues to whether the essence of the subject matter is inextricably linked to traditional notions of sovereignty. *See Johnson v. State of Maryland*, 254 U.S.

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6. State regulatory schemes that merely impose upon federal regulation or activity, without vitiating its impact or intent, can be valid exercises of state authority. *See Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 270-71, 63 S.Ct. 617, 621, 87 L.Ed. 748 (1943) (where incidence of tax not directly on government there is no violation of the Supremacy Clause); *Hancock v. Train*, 426 U.S. 167, 179-80, 96 S.Ct. 2006, 2013, 48 L.Ed.2d 555 (1976) ("[n]either the Supremacy Clause nor the Plenary Powers Clause bars all state regulation which may touch the activities of the federal government").

51, 41 S.Ct. 16, 65 L.Ed. 126 (1920) (a state cannot indirectly regulate the delivery of mail by requiring a driver's license where federal statute expressly provides that mail carrier's competence to drive is to be determined by superiors); *Mayo v. United States*, 319 U.S. 441, 63 S.Ct. 1137, 87 L.Ed. 1504 (1943) (a state cannot impose an inspection fee directly on the United States); *Miller v. State of Arkansas*, 352 U.S. 187, 188, 77 S.Ct. 257, 257-58, 1 L.Ed.2d 231 (1956) (a state cannot require licensing of construction contractor where work is to be done exclusively on a federal enclave).

Beyond those areas where Congress exercises plenary power, the traditional analysis requires a balancing of federal and state interests to determine the applicable law. To this end (1) the pervasiveness of the federal regulatory scheme, (2) whether federal occupation of the field is necessitated by a need for national uniformity, (3) the danger of conflict between state laws and the administration of federal programs, and (4) whether the state regulation infringes upon individual constitutional guarantees, are the primary considerations to be weighed. See *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 851 (1941); *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956). See also, Hirsh, Toward a New View of Federal Preemption, 1972 U. Ill. L. F. 515. Because the above considerations are for the most part reasoned judgment calls, the line of demarcation between federal and state authority is often unclear. It is against this background that our analysis of the present action begins.

#### EXCLUSIVE ZONE OF FEDERAL JURISDICTION

The district court held that absent an irreconcilable conflict between the Alcoholic Beverage Code and the

government procurement regulation in question, the Code must necessarily prevail because it implicates the Twenty-first Amendment. In reaching this conclusion the trial judge relied upon our opinion in *Castlewood International Corporation v. Simon*, 596 F.2d 638 (5th Cir. 1979), cert. granted, 446 U.S. 949, 100 S.Ct. 2914, 64 L.Ed.2d 806, *ment vacated and remanded*, 626 F.2d 1200 (5th Cir. 1980). There we rejected an administrative agency's attempt to override a state regulation relating to liquor, reasoning:

[A]ny analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme. *Id.* at 642.

While we acknowledge the continued vitality of *Castlewood* it simply does not govern the present case.

The touchstone of our analysis in *Castlewood* was that the Twenty-first Amendment represents a significant departure from the normal operation of the Commerce Clause and as such permits state regulation that would otherwise fail as a result of conflicting with that constitutional provision. *Id.* Because our examination revealed the absence of a federal interest of sufficient magnitude, beyond those expressly preempted by the Twenty-first Amendment, we held that the state regulatory scheme must prevail. It is important to note that a balancing of interests occurred only after a threshold, albeit implicit, determination of

concurrent authority and jurisdiction and an equally implicit finding that the federal government's interest was not premised solely upon the Commerce Clause. Beyond these narrow limits *Castlewood* has no vitality. The Twenty-first Amendment does not, indeed cannot, touch upon those circumstances or transactions where either the federal government occupies a zone of exclusive authority or state regulation significantly affects an area of federal concern beyond the Commerce Clause.

A major premise of the district court's analysis was its assumption that the State of Texas has the requisite jurisdiction, by virtue of the Twenty-first Amendment, to impose its legislative will upon federal enclaves located within the State. Neither our reading of the plain language of that constitutional amendment<sup>7</sup> nor the relevant case law support such an assumption. In the seminal case of *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938), the State of California's liquor licensing requirements were held not to apply to a corporation selling alcoholic beverages at the Yosemite National Park on land leased from the federal government. *Id.* at 533, 58 S.Ct. at 1016. The Court reasoned that because regulation is inextricably tied to traditional notions of sovereignty, California lacked jurisdiction, by virtue of the Twenty-first Amendment or otherwise, to regulate the sale, distribution or consumption of alcohol on a federal enclave located within the State. *Id.* at 538, 58 S.Ct. at 1018.

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7. The Twenty-first Amendment provides:

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Similarly, in *United States v. Tax Commission of Mississippi*, 412 U.S. 363, 93 S.Ct. 2183, 37 L.Ed.2d 1 (1973), the Court held that the Twenty-first Amendment has no application where transactions relating to alcoholic beverages occur between out-of-state suppliers and military enclaves located within a state. *Id.* at 380, 93 S.Ct. at 2193. Mississippi had sought to regulate the procurement of alcoholic beverages by four NFIs located in that State by compelling them to make purchases either from the State Tax Commission, at a 17 to 20 percent markup, or directly from distillers who were obligated to collect and remit the same markup to the State. Because two of the four NFIs were located on military installations that were "exclusive" as opposed to "concurrent" jurisdiction facilities, the case initially turned on the resolution of a conflict between the State's asserted scope of the Twenty-first Amendment and the exclusive federal authority over such military facilities as directed by Article I, Section 8, Clause 17 of the United States Constitution.<sup>8</sup> In balancing

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8. Article 1, Section 8, cl. 17 of the United States Constitution provides:

Section 8. The Congress shall have Power . . .

\* \* \* \*

17. To exercise exclusive Legislation in all Cases whatsoever over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

The record reveals some doubt as to whether the military installations here are subject to concurrent or exclusive jurisdiction. Because of the Supreme Court's decisions in *Tax Commission, supra*, and *Tax Commission (II)*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975), we believe that the present issues are unaffected by such distinctions since there is no contention that the State has reserved the right to regulate alcoholic beverages on those enclaves subject to concurrent jurisdiction.

these competing arguments the Court held that the Twenty-first Amendment was not implicated because there was no importation of liquor into Mississippi "for delivery or use therein." *Id.* at 375, 93 S.Ct. at 2191; *see supra* n. 7. To this end the Court reasoned

[I]t suffices to note that any legitimate state interest in regulating the importation into Mississippi of liquor purchased on the bases by individuals cannot effect an extension of the State's territorial jurisdiction so as to permit it to regulate the distinct transactions between the suppliers and the nonappropriated fund activities that involve only the importation of liquor into federal enclaves which 'are to Mississippi as the territory of one of her sister states or a foreign land,' 340 F.Supp. [903], at 906. *To conclude otherwise would be to give an unintended scope to a provision designed only to augment the powers of the States to regulate the importation of liquor destined for use, distribution, or consumption in its own territory, not to 'increase its jurisdiction,' Collins v. Yosemite Park & Curry Co., 304 U.S., at 538, 58 S.Ct. at 1018, 82 L.Ed. 1502.*

*Id.* at 378, 93 S.Ct. at 2192. (emphasis supplied).

After disposing of this issue the court remanded the case for further proceedings, including the issue of whether the 'concurrent' jurisdiction facilities were exempt from state regulation.

After remand, the case was again appealed to the Supreme Court, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed. 2d 404 (1975) ("Tax Commission II"). In the course of concluding that the legal incidence of Mississippi's markup was on the United States, the Court faced a challenge, on the basis of the Twenty-first Amendment,

to the federal government's constitutional immunity from taxation by the states. *Id.* at 601, 95 S.Ct. at 1874. The Court's rejection of this challenge was unequivocal, summarizing its analysis of the scope of a state's regulatory powers under the Twenty-first Amendment as follows:

When the case was last here we held that 'the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction [pursuant to Art. I, § 8, cl. 17, of the Constitution].' 412 U.S. at 375, 37 L.Ed.2d 1, 93 S.Ct. 2183, 2191; see *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538, 82 L.Ed. 1502, 58 S.Ct. 1009, 1018 (1938). Cf. *James v. Dravo Contracting Co.*, 302 U.S. 134, 140, 82 L.Ed. 155, 58 S.Ct. 208, 212, 114 ALR 318 (1937). We reach the same conclusion as to the concurrent jurisdiction bases to which Art. I, § 8, cl. 17, does not apply: 'Nothing in the language of the [Twenty-first] Amendment nor in its history leads to [the] extraordinary conclusion' that the Amendment abolished federal immunity with respect to taxes on sales of liquor to the military on bases where the United States and Mississippi exercise concurrent jurisdiction.

421 U.S. at 613-14.

We are persuaded that *Yosemite Park* and its progeny do little more than reaffirm the general proposition that the federal government, as a sovereign and absent a voluntary relinquishment of its sovereign rights, exercises exclusive jurisdiction over federal enclaves. We are also persuaded that regulation is an incident of sovereignty. This is not to say that a state may not institute measures

designed to prevent the unlawful diversion of alcohol destined for a federal enclave into the state's stream of commerce. See *Tax Commission, supra*, 412 U.S. at 377, 93 S.Ct. at 2192. While the functional limits of that sort of state regulation have yet to be determined, the present action does not concern it and is clearly beyond a state's regulatory powers. Like the mark-up in *Tax Commission*, there is no indication here that the Texas law under examination "is an effort to deal with problems of diversion of liquor from out-of-state shipments destined for . . . the . . . bases." See *Tax Commission, supra*, at 378, 93 S.Ct. at 2192.

Accordingly, the district court's judgment is

REVERSED.

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**Item 2**

UNITED STATES of America,  
Plaintiff-Appellant,

v.

The STATE of TEXAS, et al.,  
Defendants-Appellees.

No. 81-1597

UNITED STATES COURT OF APPEALS  
Fifth Circuit.

March 17, 1983.

Appeal from the United States District Court for the  
Western District of Texas.

ON PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING EN BANC

(Opinion January 10, 1983, 5 Cir., 1983, 695 F.2d 136).

Before BROWN, GEE and JOLLY, Circuit Judges.

**PER CURIAM:**

The opinion is revised, so that the phrase "On this same date," appearing immediately after note call 4, slip op. p. 1738, col. 2, 695 F.2d p. 137, col. 2, is replaced by "At a later date." In all other respects, the Petition for Rehearing is DENIED; and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Suggestion for Rehearing En Banc is DENIED.

A16

**Item 3**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

CIVIL ACTION NO. A-79-CA-79

(Filed October 8, 1981)

UNITED STATES OF AMERICA,  
Plaintiff

v.

THE STATE OF TEXAS; TEXAS ALCOHOLIC  
BEVERAGE COMMISSION and W. S. McBEATH  
AS ADMINISTRATOR OF THE TEXAS  
ALCOHOLIC BEVERAGE COMMISSION,  
Defendants

and LICENSED BEVERAGE  
DISTRIBUTORS, INC.,  
Intervenors.

**MEMORANDUM OPINION AND ORDER**

This case was heard before Judge Jack Roberts on September 14, 1981 in a non-jury trial on the merits in Austin, Texas. Jurisdiction of this action is conferred on this Court by 28 U.S.C. §§ 1345, 2201 and 2202. After careful consideration of all the pleadings, briefs, testimony, evidence and arguments presented at trial, the Court enters the following Memorandum Opinion which shall constitute Findings of Fact and Conclusions of Law.

Plaintiff United States of America filed its original complaint on April 23, 1979 seeking declaratory and

injunctive relief to prevent Defendants the State of Texas, The Texas Alcoholic Beverage Commission and W. S. McBeath as Administrator of the Texas Alcoholic Beverage Commission, from attempting to tax or otherwise interfere with the procurement of alcoholic beverages by the Department of Navy's Nonappropriated Fund Instrumentalities (hereinafter referred to as NFI's) and other NFI's of the United States.

On September 14, 1979, Licensed Beverage Distributors, Inc. a trade association whose members are holders of various kinds of wholesaler's permits issued under the Texas Alcoholic Beverages Code, filed its motion to intervene. Said motion was granted on October 5, 1979.

Plaintiff filed a motion for summary judgment on October 18, 1979 which was denied by the Court on January 30, 1980. On February 20, 1980, Plaintiff filed a motion for reconsideration of its motion for summary judgment citing *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) and *Goldstein v. Miller*, 488 F.Supp. 156 (D. Md. 1980) in support thereof. After consideration of said cases the Court affirmed its earlier denial of Plaintiff's motion for Summary Judgment.

On August 11, 1980, Plaintiff filed a motion for voluntary dismissal of this suit pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. Defendant and Intervenor strenuously opposed said dismissal. Upon noting that Defendant and Intervenor had expended considerable effort and expense in preparation of their defense and earnestly desired this controversy to be resolved and further that Plaintiff offered no explanation for its

motion to dismiss, the Court concluded that dismissal was inappropriate and denied the motion.

## FACTS AND ISSUES

Plaintiff United States brought this suit seeking Court approval of attempts by its officers and employees in charge of the Consolidated Package Stores at Chase Field Naval Air Station in Beeville, Texas (an NFI) to purchase alcoholic beverages outside the State and ship such beverages to the NFI's facilities in Texas for resale. This action would circumvent regulation by the Texas Alcoholic Beverage Commission and the gallonage tax imposed on wholesalers as part of the Texas regulatory scheme. Plaintiff attempted to purchase alcoholic beverages directly from non-resident wholesalers on September 25, 1978 from National Distillers Product Company of New York and subsequently in May of 1981 from Franklin Distillers Products, Limited of California.

The Texas Alcoholic Beverage Code requires a license for any kind of dealing in alcoholic beverages in the State of Texas (Sections 11.01 and 61.01, Alcoholic Beverage Code, V.T.C.S.). The holders of such licenses are authorized to purchase and import alcohol from holders of non-resident seller's permits or their agents (Chapter 20, 21 and 22, Alcoholic Beverage Code, V.T.C.S.). Holders of nonresident seller's permits are only authorized to take orders for alcohol and to ship alcohol to authorized licensees within the State of Texas (Section 37.01, Alcoholic Beverage Code, V.T.C.S.).

Plaintiff's actions in attempting to purchase alcohol directly from non-resident wholesalers were not within the confines of the Texas Regulatory scheme. Plaintiff

claims that such actions are mandated by 32 C.F.R. § 261.4(c)(1) which states:

(c) Cooperation: (1) DOD will cooperate with all duly constituted regulatory officials (local, State and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this part. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered.

The issues in this suit, although variously defined by Plaintiff, Defendant and Intervenor at different points in time, appear to the Court to be two-pronged: (1) Whether 32 C.F.R. § 261.4(c)(1) dictates that Plaintiff should circumvent the Texas Alcoholic Beverage Code by purchasing alcohol out of the State and (2) If 32 C.F.R. § 261.4(c)(1) mandates out of State purchases of alcohol by the Plaintiff and its NFI's, then does a federal interest of sufficient magnitude exist to uphold the federal regulation over the State Alcoholic Beverage Code in light of section 2 of the 21st Amendment? As the Court finds that Plaintiff has misinterpreted 32 C.F.R. § 261.4(c)(1) in that it does not affirmatively require Plaintiff to violate the Texas Alcoholic Beverage Code, the Court sees no necessity to reach the Constitutional issue posed in issue two above.

Underlying the alleged regulatory conflict in this case has been the spector of State taxation of a federal entity. The importance of this taxation question has waxed and waned throughout the course of this suit. It has long been

held that the federal government is immune from taxation by the States based on the Supremacy Clause. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819). The standard employed by the Supreme Court in recent years to determine whether a state tax improperly touches the federal government is the determination of where the legal incidence of the tax falls. See *U.S. v. State Tax Commission of Mississippi*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975).

Initially Plaintiff complained of Defendant's attempt "to tax or otherwise interfere with the procurement of alcoholic beverages . . ." (See Plaintiff's Original Complaint at page 1). However, at several points in its briefs the government concedes that this is not a tax case and at trial Plaintiff's counsel offered to stipulate that the State of Texas was not seeking to impose a tax directly on the federal government. Although the cost the NFI is seeking to avoid by purchasing alcohol out of state is in fact the Texas gallonage tax imposed on wholesalers, the crux of the controversy in this cause is the alleged conflict between the federal regulation and the Texas Alcoholic Beverage Code which includes the tax on wholesalers.

## THE ALLEGED CONFLICT

32 C.F.R. § 261.4(c)(1) was promulgated pursuant to the authority of the 1951 Amendments to the Universal Military Training and Service Act, 30 U.S.C. App. § 473 which states in pertinent part:

The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or

by members of the Armed Forces or the National Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps.

This statute addresses the regulation of alcohol on or about military bases but does not express an intent to entirely co-opt and ignore the States' regulations of the procurement of alcohol. The State of Texas makes no pretense towards regulating alcoholic beverages once they have reached a federal enclave. Plaintiff has interpreted the last sentence of 32 C.F.R. § 261.4(c)(1) which states ". . . shall obtain for the Government the most advantageous contract, price and other factors considered," as calling for out of state purchases of alcohol thereby circumventing the Texas gallonage tax levied on wholesalers of alcohol and the Texas regulations over the importation of alcohol.

The Texas Alcoholic Beverage Code was enacted pursuant to the express regulatory authority granted the States under § 2 of the 21st Amendment to the United States Constitution which reads:

Sec. 2. The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The United States Supreme Court has consistently held that regulations by the States of alcoholic beverages under the 21st Amendment have a special status. In *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) Justice Rehnquist writing for the majority stated:

While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals. In *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."

The evidence produced at the trial of this case clearly demonstrates that the Texas regulatory scheme is designed to and does in fact protect the public health and welfare of the people of Texas. The federal government does not appear to contest the validity of the regulation of alcoholic beverage distribution in Texas in general. However, Plaintiff argues on the basis of the Supremacy Clause that these State regulations are inapplicable to the federal government in the case of a conflict between State and Federal regulations. Plaintiff states in its post-trial brief: "The evidence produced at the trial of this case disclosed a dynamic conflict between two regulatory systems." (Plaintiff's Memorandum Following Trial, page 1).

The Court finds that the evidence did not demonstrate any conflict between the State and Federal regulations and that the NFI in question did not strictly comply with its own interpretation of the Federal regulation.

The testimony of Robert L. Franke, former Administrative Officer at Chase Field Naval Air Station in Beeville, Texas established that the NFI in this particular

case did not attempt to procure alcohol at the lowest available price within the State of Texas or from out of State wholesalers. He stated at trial that they followed an informal procedure in trying to procure alcohol at the best available price. (Trial Transcript at 24.) Mr. Franke testified that he attempted through his manager to purchase alcohol directly from National Distillers of New York in September of 1978 without verifying that they offered the cheapest available price. Further, the limited quantities ordered by the NFI in the transactions that are at issue in this suit were clearly not designed to obtain the best available price.

The Court finds, based on the testimony and evidence, that the one attempted and one successful out of state purchase of alcohol were transactions formulated by the Plaintiff to test the State regulatory scheme for alcohol. The main purpose of their actions in this suit and the events surrounding it was to circumvent the State's regulation of alcohol and the tax which is part of that scheme. The United States, the Navy and the NFI in question did not follow their own policy of cooperation elucidated in 32 C.F.R. § 261.4(c)(1). The evidence and testimony established that the government equated the phrase "most advantageous contract" with best price, while ignoring other factors which should have been considered. The paramount factor which should be considered in cases of this nature is the great deference reserved for state regulation of alcohol. In *Castlewood International Corporation v. Simon*, 596 F.2d 638 (5th Cir. 1979), cert. granted, 446 U.S. 949, j'ment vacated and remanded, 626 F.2d 1200 (5th Cir. 1980) the Circuit Court stated:

Thus any analysis of the validity of a state statute regulating liquor does not proceed via the traditional

route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme. *Id.* at 642.

On remand from the Supreme Court for further consideration in light of *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the Circuit Court reaffirmed its earlier decision by finding that there was no federal interest of sufficient magnitude to outweigh the state interests.

The Court concludes that the correct interpretation of 32 C.F.R. § 261.4(c)(1) which is consistent with the authorizing statute, the U.S. Constitution and the case law in this area, is that the federal Plaintiff should attempt to procure the most advantageous contract for purchasing alcohol while at the same time complying with the Texas Alcoholic Beverage Code.

## CONCLUSION

After careful consideration, the Court is of the opinion that there is no apparent conflict between the federal regulation and the state regulations in question, other than the conflict fabricated by the Plaintiff and its instrumentalities for the purposes of this suit. The United States and its various instrumentalities shall henceforth comply with its own regulation concerning the procurement of alcohol and seek the "most advantageous contract" which includes the best price available within the

confines of compliance with the state regulatory scheme which is certainly the most important "other factor" to be considered.

All relief sought by the parties to this suit which is not expressly granted herein is denied and the Clerk shall enter Judgment in conformity with this Memorandum Opinion and Order. This opinion shall constitute Findings of Fact and Conclusions of Law.

ENTERED on this the 27th day of October, 1981, at Austin, Texas.

/s/ JACK ROBERTS

Jack Roberts

Senior United States District Judge

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

Civil Action File No. A-79-CA-79

(Filed October 27, 1981)

UNITED STATES OF AMERICA

v.

THE STATE OF TEXAS; TEXAS ALCOHOLIC  
BEVERAGE COMMISSION and W. S. McBEATH  
as ADMINISTRATOR OF THE TEXAS ALCOHOLIC  
BEVERAGE COMMISSION, and  
LICENSED BEVERAGE DISTRIBUTORS, INC.

JUDGMENT

This action came on for trial before the Court, Honorable JACK ROBERTS, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged after careful consideration, the Court is of the opinion that there is no apparent conflict between the federal regulation and the state regulations in question, other than the conflict fabricated by the Plaintiff and its instrumentalities for the purposes of this suit. The United States and its own regulation concerning the procurement of alcohol and seek the "most advantageous contract" which includes the best price available within the confines of compliance with the state

regulatory scheme which is certainly the most important "other factor" to be considered.

All relief sought by the parties to this suit which is not expressly granted herein is denied and the Clerk shall enter Judgment in conformity with this Memorandum Opinion and Order. This opinion shall constitute Findings of Fact and Conclusions of Law.

Dated at Austin, Texas, this 27th day of October, 1981.

CHARLES W. VAGNER  
Clerk of the Court

By /s/ Signature Illegible  
Deputy Clerk

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Item 4

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

CIVIL ACTION NO. A-79-CA-79

(Filed January 30, 1980)

UNITED STATES OF AMERICA

v.

THE STATE OF TEXAS, ET AL.

ORDER

Came on this day for consideration by the Court Plaintiff's Motion for Summary Judgment. After careful consideration of the motion and the briefs, the Court is of the opinion that the motion is without merit and should be denied.

In this action the Plaintiff, the United States of America, alleges that the Defendants, the State of Texas and the Texas Alcoholic Beverage Commission, have attempted to illegally tax or otherwise interfere with the alcoholic beverage procurement activities of instrumentalities of the United States. Plaintiff seeks a declaratory judgment that all nonappropriated fund instrumentalities of the United States located within the State of Texas may purchase alcoholic beverages outside the State of Texas and ship such beverages to facilities within the State of Texas for purpose of resale without liability for alcoholic beverage taxes imposed by the State of Texas

and free from regulation by the State of Texas. The Plaintiff also requests that the Court enjoin the Defendants from taking any action to interfere with the procurement of alcoholic beverages from outside the State of Texas by nonappropriated fund instrumentalities of the United States located in Texas.

The Plaintiff's claim, in simplified form, is that the Defendants' regulation and taxation of alcoholic beverages purchased by Plaintiff's military installations conflicts with Plaintiff's own regulation, and accordingly, the Defendants' regulation and taxation should cease.

Plaintiff points to 50 U.S.C., Appendix, § 473, which says the Secretary of Defense is authorized to make such regulations as he deems necessary to govern the sale, consumption, possession of or traffic in alcoholic beverages, and 32 C.F.R. § 261.4(c) which states in part that, "the purchase of all alcoholic beverages . . . shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price, and other factors considered."

The Court initially notes that state regulation of alcoholic beverages occupies a unique position. As was noted in *Castlewood International Corporation v. Simon*, 596 F.2d 638 (5th Cir. 1979),

" . . . any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme." *Id.* at 642.

In *Castlewood*, the Fifth Circuit Court of Appeals noted in their discussion of the Supremacy Clause argument that:

"Federal laws have prevailed over state regulation of intoxicating liquors in only two circumstances: 1) where the state regulation was repugnant to overriding national concern with due process and equal protection, and 2) where the state has sought to invade an area of exclusive federal concern. . . ." *Id.* at 643.

Plaintiff claims that Defendants' regulations requiring Plaintiff to purchase alcoholic beverages from vendors who have been issued Texas permits results in Plaintiff having to pay the Texas gallonage tax, and such conflicts with the federal regulation that alcoholic beverages be obtained at the most advantageous price. Plaintiff cites *United States v. State Tax Commission of Mississippi*, 421 U.S. 599 (1975) in support of the contention. Careful examination of that decision reveals that it provides no support for the Plaintiff's claim. The Mississippi statute in question there required that the state tax be passed on to the purchaser. Such is not the case in the Texas regulatory scheme as there is no requirement that the legal incidence of the tax fall on the government. As the affidavits filed in opposition to Plaintiff's Motion for Summary Judgment indicate, the Texas taxes are absorbed by the liquor wholesalers and are treated as a cost of doing business. The tax situation in Texas is not unlike that system that was upheld in *Polar Co. v. Andrews*, 375 U.S. 361 (1964), cited with approval in *United States v. State Tax Commission of Mississippi*, *supra*, at footnote 9. It seems to this Court that the

Plaintiff has failed to show that as a matter of law any conflict exists between the Plaintiff's and Defendants' regulations, accordingly, the relief requested in Plaintiff's Motion for Summary Judgment must be denied. It is accordingly

ORDERED, ADJUDGED and DECREED that the relief sought in Plaintiff's Motion for Summary Judgment be, and hereby is, DENIED.

Entered this 30th day of January, 1980, at Austin, Texas.

/s/ JACK ROBERTS  
Jack Roberts, Chief Judge  
Western District of Texas

**Item 5**

**CHAPTER 37. NONRESIDENT SELLER'S  
PERMIT**

Sec. 37.01. **AUTHORIZED ACTIVITIES.** The holder of a nonresident seller's permit may:

(1) solicit and take orders for liquor from permittees authorized to import liquor into this state;

(2) ship liquor into this state, or cause it to be shipped into this state, in consummation of sales made to permittees authorized to import liquor into the state.

Sec. 37.02. **FEE.** The annual state fee for a nonresident seller's permit is \$100.

Sec. 37.03. **PERMIT REQUIRED.** A nonresident seller's permit is required of any distillery, winery, importer, broker, or person who sells liquor to permittees authorized to import liquor into the state, regardless of whether the sale is consummated inside or outside the state.

Sec. 37.04. **INTEREST IN BREWER'S PERMIT.** A person who holds a nonresident seller's permit may have an interest in the business, assets, corporate stock, or permit of a person who holds a brewer's permit.

Sec. 37.05. **APPOINTMENT OF AGENT FOR SERVICE OF NOTICE.** (a) No person may be issued a nonresident seller's permit until he shows that he has filed a certificate with the secretary of state certifying that he has appointed a resident of this state as his agent for the purposes of this section. The certificate shall contain the name, street address, and business of the agent.

(b) A notice of a hearing for the refusal, cancellation, or suspension of a permit may be served on any of the following:

- (1) the agent designated in the certificate on file with the secretary of state;
- (2) any person authorized to sell liquor in this state as agent of the permittee; or
- (3) the permittee or, if the permittee is a corporation, any officer of the corporation.

(c) If a permittee fails to maintain a designated agent, notice of a hearing may be served on the secretary of state. In that case, the secretary of state shall forward the notice to the permittee by registered mail, return receipt requested, and the receipt shall be prima facie evidence of service on the permittee.

(d) Provisions of this code generally applicable to hearings for the refusal, cancellation, or suspension of a permit also to apply to proceedings relating to the refusal, cancellation, or suspension of a nonresident seller's permit.

**Sec. 37.06. DESIGNATION OF AGENTS.** Every holder of a nonresident seller's permit shall designate, in the manner required by the commission and on forms prescribed by it, those persons authorized as agents to represent the permittee in this state. The failure to do so is a violation of this code.

**Sec. 37.07. PROHIBITED ACTIVITIES.** No holder of a nonresident seller's permit, nor any officer, director, agent, or employee of the holder, nor any affiliate of the holder, regardless of whether the affiliation is corporate or by management, director, or control, may do any of the following:

(1) hold or have an interest in the permit, business assets, or corporate stock of a person authorized to import liquor into this state for the purpose of resale unless the interest was acquired on or before January 1, 1941, or unless the permittee is a Texas corporation holding a manufacturer's license and a brewer's permit issued before April 1, 1971;

(2) fail to make or file a report with the commission as required by a rule of the commission;

(3) sell liquor for resale inside this state that fails to meet the standards of quality, purity, and identity prescribed by the commission;

(4) advertise any liquor contrary to the laws of this state or to the rules of the commission, or sell liquor for resale in this state in violation of advertising or labeling rules of the commission;

(5) sell liquor for resale inside this state or cause it to be brought into the state in a size of container prohibited by this code or by rule of the commission;

(6) solicit or take orders for liquor from a person not authorized to import liquor into this state for the purpose of resale;

(7) induce, persuade, or influence, or attempt to induce, persuade, or influence, a person to violate this code or a rule of the commission, or conspire with a person to violate this code or a rule of the commission; or

(8) exercise a privilege granted by a nonresident seller's permit while an order or suspension against the permit is in effect.

Sec. 37.08. CANCELLATION OR SUSPENSION: NOTICE TO IMPORTERS. When a nonresident seller's permit is cancelled or suspended, the commission shall immediately notify in writing all permittees authorized to import liquor into the state.

Sec. 37.09. RESTRICTION ON IMPORTATION. No person who holds a permit authorizing the importation of liquor, nor his agent or employee, may purchase or order liquor for importation from any person other than a nonresident seller's permittee. An importer may not purchase or order liquor from a non-resident seller's permittee whose permit is under suspension after the importer has received notice of the suspension.

Sec. 37.10. RESTRICTION AS TO SOURCE OF SUPPLY. (a) No holder of a nonresident seller's permit may solicit, accept, or fill an order for distilled spirits or wine from a holder of any type of wholesaler's permit unless the nonresident seller is the primary American source of supply for the brand of distilled spirits or wine that is ordered.

(b) In this section, "primary American source of supply" means the distiller, the producer, the owner of the commodity at the time it becomes a marketable product, the bottler, or the exclusive agent of any of those. To be the "primary American source of supply" the nonresident seller must be the first source, that is, the manufacturer or the source closest to the manufacturer, in the channel of commerce from whom the product can be secured by American wholesalers.

Sec. 37.11. SUBMISSION OF SAMPLES AND LABELS. (a) Before a nonresident seller's permittee may

ship distilled spirits into this state, he shall furnish the commission samples of each brand, properly labeled and in the containers in which they are to be sold. He shall submit with the samples applications for label approval for each brand.

(b) The commission or its authorized agents shall test the contents and examine the label and container of the samples and determine whether they meet all requirements of state law and of the rules of the commission. If the label, container, and contents are found to be in compliance, the commission shall issue the permittee a certificate to that effect.

(c) As to distilled spirits imported directly from the distiller, bottler, or the exclusive agent of either, or distilled spirits distilled or bottled by the nonresident seller or by a distiller or bottler for whom the nonresident seller is the exclusive agent, if the samples are approved under Subsection (b) of this section, the permittee is not required to submit additional samples unless there is a change in the label, contents, or style or size of the container, or unless he is directed to do so by the commission.

(d) As to all other distilled spirits, samples must be furnished to the commission for each brand and size in each proposed shipment into the state, together with a sworn statement of the quantity and sizes to be shipped, the permittee to whom the spirits are to be shipped, and the person or firm from whom they are to be shipped. The permittee may not ship the distilled spirits until he has in his possession a certificate of approval from the commission.

Sec. 37.12. INSPECTION OF RECORDS, DOCUMENTS, ETC. (a) In this section, "officer" means a representative of the commission, the attorney general, or an assistant or representative of the attorney general.

(b) If an officer wishes to examine the books, accounts, records, minutes, letters, memoranda, documents, checks, telegrams, constitution and bylaws, or other records of a nonresident seller's permittee, he shall make a written request to the permittee or his duly authorized manager or representative or, if the permittee is a corporation, to any officer of the corporation. An officer may examine the records as often as he considers necessary.

(c) When a request for an examination is made, the person to whom it is directed shall immediately allow the officer to conduct the examination, and the person shall answer under oath any question asked by the officer relating to the records.

(d) The officer may investigate the organization, conduct, and management of any nonresident seller's permittee and may make copies of any records which in the officer's judgment may show or tend to show that the permittee has violated state law or the terms of his permit.

(e) An officer may not make public any information obtained under this section except to a law enforcement officer of this state or in connection with an administrative or judicial proceeding in which the state or commission is a party concerning the cancellation or suspension of a nonresident seller's permit, the collection of taxes due under state law, or the violation of state law.

(f) The commission shall cancel or suspend a non-resident seller's permit in accordance with this code if a permittee or his authorized representative fails or refuses to permit an examination authorized by this section or to permit the making of copies of any document as provided by this section, without regard to whether the document is inside or outside the state, or if the permittee or his authorized representative fails or refuses to answer a question of an officer incident to an examination or investigation in progress.

**Sec. 37.13. SOLICITATION FROM HOLDER OF MIXED BEVERAGE OR PRIVATE CLUB PERMIT.** A holder of a nonresident seller's permit may not solicit business directly or indirectly from a holder of a mixed beverage permit or a private club registration permit unless he is accompanied by the holder of a wholesaler's permit or the wholesaler's agent.

**Sec. 37.14. MONTHLY REPORTS.** The commission shall promulgate rules requiring holders of nonresident seller's permits to file monthly reports of liquor sold to persons within this state. The reports shall be supported by copies of invoices. The commission shall prescribe and furnish forms for this purpose.

Nos. 82-2003 and 82-2013

Office Supreme Court, U.S.

FILED

AUG 29 1983

ALEXANDER L. STEVAS,  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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LICENSED BEVERAGE DISTRIBUTORS ASSOCIATION,  
PETITIONER

v.

UNITED STATES OF AMERICA

---

STATE OF TEXAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

REX E. LEE

*Solicitor General*

GLENN L. ARCHER, JR.

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*Washington, D.C. 20530*

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### QUESTION PRESENTED

Whether the State of Texas may constitutionally prohibit a congressionally-created "non-appropriated fund instrumentality" from purchasing liquor directly from out-of-state wholesalers.

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 82-2003

LICENSED BEVERAGE DISTRIBUTORS ASSOCIATION,  
PETITIONER

v.

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No. 82-2013

STATE OF TEXAS, ET AL., PETITIONERS

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO  
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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A3-A14)<sup>1</sup> is reported at 695 F.2d 136. The memorandum opinion and order of the district court (Pet. App. A16-A25) is not reported.

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<sup>1</sup>"Pet. App." refers to the appendix to the petition in No. 82-2003.

## JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A2) was entered on January 10, 1983. A petition for rehearing (Pet. App. A15) was denied on March 17, 1983. The petitions for a writ of certiorari in Nos. 82-2003 and 82-2013 were filed on June 8 and 10, 1983, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Texas Alcoholic Beverage Code creates what the State describes as a three-tier regulatory system for the distribution of liquor within the State. Tex. Alco. Bev. Code Ann. § 11.01(a) (Vernon 1978). Nonresident sellers of alcoholic beverages may sell only to resident wholesalers who have a permit, granted by the State's Alcoholic Beverage Commission ("TABC"), which authorizes the wholesaler to import alcoholic beverages into Texas. *Id.* §§ 19.01, 20.01, 37.01 (Pet. App. A4). Wholesale permit holders, who, in turn, sell to resident retailers, are required to pay a tax of two dollars to the State for each gallon of distilled spirits sold. Tex. Alco. Bev. Code Ann. § 201.03(a) (Vernon 1978).

During 1978, three "non-appropriated fund instrumentalities" ("NFI")<sup>2</sup> of the Navy located on bases in Texas concluded that a procurement regulation of the Department of Defense (32 C.F.R. 261.4(c)) authorized them to import alcoholic beverages directly from nonresident sellers

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<sup>2</sup>NFIs, such as officers' and enlisted men's clubs and package stores, are not supported by direct government funding. Their activities, including the sale of alcoholic beverages, are expected to generate profits which can be used to fund military recreational and morale programs (Pet. App. A4 n.2).

without complying with Texas's restrictions on the distribution of liquor (Pet. App. A4-A5).<sup>3</sup> Accordingly, the NFIs began to make offers to purchase and to purchase liquor at substantially reduced prices directly from nonresident sellers.

In response to the NFIs' action, TABC sent bulletins to all wholesalers and nonresident sellers in January and July 1978, threatening to take legal action against any nonresident sellers who sold directly to military installations located in the State, bypassing in-state wholesalers (Pet. App. A5).<sup>4</sup> In addition, TABC instituted proceedings against a California distiller for an "unauthorized" sale of alcoholic beverages to a Navy installation, and suspended the distiller's license to export liquor to Texas for seven days (*id.* at A4). TABC also sent a letter to the Navy warning it against further attempts to purchase directly from out-of-state sources (PX 3):

The Department of the Navy \* \* \* is in direct violation of state law, which prohibits a non-resident seller's permittee to sell to a retailer in the State of Texas, thereby escaping the state gallonage tax on liquor.

\* \* \* \* \*

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<sup>3</sup>2 C.F.R. 261.4(c) provides in pertinent part:

(1) DOD will cooperate with all duly constituted regulatory officials (local, State and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this part. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price, and other factors considered.

(2) This policy of cooperation is not to be construed \* \* \* as an admission of any legal obligation to submit to State control.

<sup>4</sup>The head of the procurement section of the Navy's Recreational Services Division testified that Texas's restrictions on the Navy's sources of supply result in NFIs in Texas paying between \$4 and \$24 a case more for their supplies than is paid by naval facilities in other states (3 R. 88).

If you choose to continue to receive shipments of liquor from a non-resident seller, the Texas Alcoholic Beverage Commission will seek any available remedy at law against any and all parties involved in these transactions \* \* \*.

2. The United States filed suit in the United States District Court for the Western District of Texas against the State of Texas and the State's officers responsible for enforcing the alcohol beverage laws. The complaint sought an injunction against the State's attempt to regulate NFI liquor purchases and a declaration that the Texas regulatory scheme for the sale of alcoholic beverages was unconstitutional as applied to NFI purchases pursuant to the procurement regulations. Petitioner Licensed Beverage Distributors Association moved to intervene as a party defendant, and its motion was granted.

After trial, the district court entered judgment for petitioners. The court held that the procurement regulation, 32 C.F.R. 261.4(c)(1), did not authorize NFIs to circumvent state law. Instead, the regulation assumed compliance with local law, and the regulation's reference to "most advantageous contract" simply meant the best price obtainable while complying with Texas's regulatory scheme regarding alcoholic beverages (Pet. App. A24).

The court of appeals reversed (Pet. App. A3-A14). It reasoned that procurement for a military base is a matter of exclusive federal concern and not subject to state regulation (*id.* at A10). The court also rejected petitioners' claim that the Twenty-first Amendment of the United States Constitution granted the State authority to regulate liquor sales to NFIs; it held that the Twenty-first Amendment did not confer power to regulate alcoholic distribution to federal enclaves (Pet. App. A10).

### ARGUMENT

1. The court of appeals correctly held that the Supremacy Clause prohibits the State of Texas from regulating the procurement activities of military installations located within its borders. This Court has made clear that federal authority over military procurement is exclusive and any attempt by the State to regulate procurement is impermissible.<sup>5</sup> *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) (state cannot require construction contractor on military base to obtain license); *Paul v. United States*, 371 U.S. 245 (1963) (state minimum milk price inapplicable to purchases by military bases).

In this case, NFIs on naval bases located in Texas sought to purchase alcoholic beverages directly from out-of-state distillers, rather than from Texas wholesalers, because the higher prices of the local wholesalers necessarily reflected their costs of operation (including the Texas gallonage tax) and profit margin. Texas, in order to protect its tax revenues, sought to require the United States to buy only from Texas wholesalers (Pet. App. A5). *Leslie Miller, Inc.* and *Paul* make clear, however, that under the Supremacy Clause the State's liquor regulation cannot be applied to the NFIs' procurement activities<sup>6</sup>

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<sup>5</sup>Article I, Section 8, of the United States Constitution makes plain that the conduct of the military is a matter of exclusive federal concern by granting Congress the exclusive authority to "raise and support Armies," to "provide and maintain a Navy" and to regulate "the land and naval Forces."

<sup>6</sup>Petitioners erroneously contend (82-2003 Pet. 9-11, 17; 82-2013 Pet. 11-13) that the court of appeals' decision was based on facts, not supported by any evidence, with respect to whether the naval bases were within the "exclusive" or "concurrent" jurisdiction of the federal government. The court of appeals specifically stated (Pet. App. A11, n.8), however, that its decision was unaffected by such concepts. Although petitioners point to the use of the term "exclusive zone of federal jurisdiction," the opinion makes clear that it is referring to

2. Petitioners argue (82-2003 Pet. 22-25; 82-2013 Pet. 27-30) that the special grant of authority in the Twenty-first Amendment allowing the states to regulate alcoholic beverages overrides the federal government's right to procure liquor free of state regulation. This argument is without merit.

The Twenty-first Amendment grants the states no power to regulate federal military procurement simply because alcoholic beverages are involved. Compare *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *United States v. Mississippi Tax Commission*, 412 U.S. 363 (1973); *United States v. Mississippi Tax Commission*, 421 U.S. 599 (1975).<sup>7</sup> The principal purpose of Section 2 of the Twenty-first Amendment is to permit the states to regulate and tax private commerce in alcoholic beverages in a

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subject matters of exclusive federal concern (such as federal military procurement) and not to matters of geography (*id.* at A8-A12). The court discussed geography in the context of rejecting petitioners' claim that the grant of authority in the Twenty-first Amendment over the distribution of alcoholic beverages within the State includes authority to regulate liquor distribution to a federal enclave.

<sup>7</sup>The State argues (82-2013 Pet. 19-22) that the federal government's procurement policies do not necessarily conflict with the State's regulatory scheme. But a conflict exists and requires the State's law to give way. Congress expressly authorized the Secretary of Defense to adopt any regulations he deems appropriate governing consumption of liquor on military bases. 50 U.S.C. App. 473. Obviously, regulations governing procurement have the effect of regulating the consumption of liquor on the base. Accordingly, the procurement regulation is fully authorized by statute.

The regulation in turn clearly states that it, and not state law, shall govern the procurement of liquor for military bases. Since the regulation is supported by statute and was intended to create a federal standard with respect to the cost of liquor, it plainly preempts Texas's alcoholic beverage regulations. Compare *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, No. 81-750 (June 28, 1982), slip op. 11-12.

manner which, without the Amendment, might come into conflict with the Commerce Clause. See *Craig v. Boren*, 429 U.S. 190, 206 (1976); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62-63 (1936). The Amendment was not intended to increase the authority of the states to regulate the affairs of the federal government.<sup>8</sup> Cf. *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (state tax on foreign importer of alcohol struck down, since it violated Export-Import Clause); see also *United States v. Mississippi Tax Commission*, 421 U.S. 599, 613 (1975) (federal government immune from taxation of purchases of alcoholic beverages). As this Court stated in *Craig v. Boren*, *supra*, 429 U.S. at 206, "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful."

3. Petitioners (82-2003 Pet. 8, 18-22; 82-2013 Pet. 5-10) characterize this case as involving the scope of the federal government's constitutional immunity from state taxation, and claim that the decision below is based on a construction of the immunity doctrine which is in conflict with decisions

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<sup>8</sup>Petitioners' reliance (82-2003 Pet. 22-23; 82-2013 Pet. 11, 23) on *Rice v. Norman Williams Co.*, No. 80-1012 (July 1, 1982) is misplaced. In *Rice*, this Court held only that a state's regulation of importers of distilled spirits did not, on its face, necessarily conflict with the Sherman Act.

The State petitioners argue (82-2013 Pet. 22) that the regulatory scheme is being applied to the NFIs so that TABC "is \* \* \* able to track the flow of liquor into the State." Compare *United States v. Mississippi Tax Commission*, 412 U.S. 363, 378 (1973). The court below, however, acknowledged the State's legitimate interest in protecting against diversion of liquor from the federal enclave into the State, but found that Texas's laws were not "an effort to deal with problems of diversion of liquor" (Pet. App. A14, quoting *Mississippi Tax Commission*, *supra*, 412 U.S. at 378). Given the State's repeated references in its bulletins to the gallonage tax and its failure to cite any instances of diversion, the court's finding is amply justified.

of this Court. See, e.g., *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964). Petitioners assert that like the tax in *Polar Ice Cream* (82-2003 Pet. 19; 82-2013 Pet. 7) the legal incidence of the Texas gallonage tax is on the Texas wholesalers, not their customers, and that, consequently, imposition of the tax with respect to purchases of alcoholic beverages by the military does not violate the immunity of the federal government.

The tax immunity doctrine, however, is not involved in this case. Indeed, the United States expressly conceded in the court of appeals (81-1597 Appellant's Reply Br. 3-4) that the Texas gallonage tax is not an unconstitutional tax on federal instrumentalities, and that, if the NFIs chose to purchase from Texas wholesalers, the State could constitutionally collect the gallonage tax with respect to such purchases. Texas has not, however, simply imposed a tax on local suppliers with whom the NFIs might choose to do business. Rather, it is attempting to regulate military procurement by precluding the NFIs from purchasing alcoholic beverages from any suppliers other than Texas wholesalers. It is this attempted regulation of military procurement that the court of appeals struck down as violative of the Supremacy Clause. Accordingly, there is no conflict with *Polar Ice* and similar decisions of this Court involving the immunity doctrine.

#### CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE

*Solicitor General*

GLENN L. ARCHER, JR.

*Assistant Attorney General*

AUGUST 1983

SEP 19 1983

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NO. 82-2003

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1982

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LICENSED BEVERAGE DISTRIBUTORS  
ASSOCIATION,  
*Petitioner*

v.

UNITED STATES OF AMERICA,  
*Respondent*

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On Writ of Certiorari to the  
United States Court of Appeals  
For the Fifth Circuit

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**PETITIONER'S REPLY TO BRIEF FOR THE  
UNITED STATES IN OPPOSITION**

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**LIST OF PARTIES***Petitioner:*

Licensed Beverage Distributors Association, whose members are:

Accent Wine & Spirits  
American Wine  
Block Distributing Company  
Glazer Wholesale Drug  
Golman Wholesale Liquor Co., Inc.  
Key Distributors, Inc.  
Lone Star Company  
Longhorn Liquors, Ltd.  
McKesson Wine & Spirits  
Quality Beverage Company  
Schepps Wholesale Liquors  
Tarrant Distributors  
Terk Distributing Company  
White Rose

*Respondent:*

United States of America in behalf of the  
Department of the Navy, Consolidated Package  
Store, Beeville Naval Air Station and other  
nonappropriated fund instrumentalities.

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NO. 82-2003

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On Writ of Certiorari to the  
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For the Fifth Circuit

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**PETITIONER'S REPLY TO BRIEF FOR THE  
UNITED STATES IN OPPOSITION**

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The following reply to the Brief in Opposition<sup>1</sup> is respectfully submitted under the authority of Rule 22.5 of the Rules of this Court.

**RESPONDENT'S BRIEF NARROWS THE ISSUES  
BUT ESTABLISHES ADDITIONAL REASONS  
FOR GRANTING THE WRIT.**

Both in stating the facts (Brief, 2-4) and in presenting argument (Brief, 7-8), Respondent recognizes that the only control which the State of Texas has ever exercised has been over its own permittees—nonresident sellers and

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1. The brief responds to the petition of the State of Texas, et al., Cause No. 82-2013, as well as to that presented by this Petitioner. Since both petitions relate to the same decision, they are appropriately subject to joint consideration. For that purpose this Petitioner adopts the arguments made in the reply brief being submitted by the Petitioners in Cause No. 82-2013.

wholesalers. Texas has not assumed to require the non-appropriated fund instrumentalities (NFIs) to secure permits and has never asserted a claim against any one of them. The NFIs can and do purchase alcoholic beverages from Texas wholesalers.<sup>2</sup>

Respondent concedes that the legal incidence of the Texas gallonage tax is on the wholesalers—not on the federal government and, therefore, that “the Texas gallonage tax is not an unconstitutional tax on federal instrumentalities” (Brief, 8). The admitted purpose of the suit was to enable the NFIs to circumvent the Texas wholesalers and thereby avoid the incidental effect of the gallonage tax (Brief, 3-4). Respondent’s contention is that in enforcing state law, Texas is “precluding the NFIs from purchasing alcoholic beverages from any [out-of-state] suppliers” in violation of the Supremacy Clause (Brief, 8). In other words, Respondent’s position is that the Supremacy Clause confers immunity from state law on those who would sell alcoholic beverages to NFIs. Respondent assumes to interpret the opinion of the Court of Appeals as so holding (Brief, 8).<sup>3</sup>

**AS INTERPRETED BY RESPONDENT, THE  
OPINION BELOW CONFLICTS AT LEAST  
IN PRINCIPLE WITH WASHINGTON V.**

**UNITED STATES, \_\_\_\_U.S.\_\_\_\_, 103**

**S.CT. 1344 (1983).**

The cited case, like the case at bar, was instituted by the United States as a suit for declaratory judgment and

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2. Those facts were established (III-R. 51, 87, 129-130, 155), and Respondent does not assert anything to the contrary.

3. Petitioner continues to believe that the opinion below was properly analyzed in its petition and, therefore, accepts Respondent’s interpretation only for the limited purpose of showing that even as defensively interpreted, the opinion is in conflict with and contrary in principle to this Court’s decisions.

injunctive relief. In Washington, the United States sought to provide third parties, contractors who worked for the federal government, with immunity from a state sales tax. In Texas the United States sought to provide other third parties, nonresident sellers who might sell to NFIs, with immunity from regulation under the Texas Alcoholic Beverage Code. In both instances relief was sought under the Supremacy Clause.

The contractor in the Washington situation was identified by this Court as "a vendor of services to the United States" (103 S.Ct. 1350). A nonresident seller from whom NFIs would purchase in the Texas situation would be "a vendor of alcoholic beverages to the United States." It is, of course, true that the Washington case involved a tax the legal incidence of which did not fall on the federal government, but as this Court noted (103 S.Ct. 1349), the economic burden of the tax was or could be passed on to the federal government. The obvious objective of the suit seeking tax immunity for the contractor was to lower the price which the government would have to pay for the contractor's services. In the case at bar immunity from state regulation—rather than taxation—has been sought for nonresident sellers of alcoholic beverages, but in view of the admitted fact that NFIs want to purchase directly from nonresident sellers in order to avoid any pass through of the Texas gallonage tax, the objectives of the two suits are not really distinguishable. After discussing a comparable difference urged by the government in the *Washington* case, this Court commented, "To rest upon this distinction would be to elevate form over substance" (103 S.Ct. 1350). The prior judgment for the government was reversed by the holding that (103 S.Ct. 1350):

"In short, Washington has not singled out contractors who work for the United States for discriminatory treatment. It has merely accommodated for the fact that it may not impose a tax directly on the United States as the project owner. This the State may do without running afoul of the Supremacy Clause."

The reason for reversal in the case at bar is even more compelling. Washington had only a short time earlier drafted the provision there in question with the specific purpose of placing the legal incidence of the tax on the contractor rather than on the federal government. The suit was instituted shortly thereafter (103 S.Ct. 1347). Texas has imposed permit requirements on and regulated nonresident sellers for more than forty years (Acts 1943, 48th Leg., ch. 325, p. 509), and the gallonage tax on liquor has been levied against Texas wholesalers since the repeal of prohibition (Acts 1935, 44th Leg., 2nd C.S., ch. 467, p. 1795). Acceptance of Respondent's interpretation of the opinion below results in that opinion's being in conflict with the basic principles followed by this Court in its recent decision in *Washington v. United States* and provides an additional and compelling reason for granting the writ.

**THE THEORY OF SUPREMACY CLAUSE PROTECTION FOR ALL PROCUREMENT ACTIVITIES IS UNSUPPORTED BY AUTHORITY AND IN CONFLICT WITH THE PRINCIPLES FOLLOWED BY THIS COURT IN THE VERY DECISIONS ON WHICH RELIANCE HAS BEEN PLACED.**

Respondent's basic position is that procurement activities constitute a particular category immune from state regulation. The *Washington* case discussed above refutes that contention, but Respondent assumes to interpret

*Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1963), and *Paul v. United States*, 371 U.S. 245 (1963), as establishing that procurement activities of military installations have an absolute immunity from state control. In neither instance, however, did this Court base its decision on that ground.

In *Leslie Miller, Inc.*, a contractor employed by the government to construct an air force base in Arkansas had been convicted for working as a contractor without a state-issued license. This Court quoted both the federal requirements for a contractor and the state licensing provisions and pointed out that the "mere enumeration" was "sufficient to indicate conflict . . . [which] would thus frustrate the expressed federal policy" (352 U.S. 189-190). In other words, that was a classic case of conflict under the Supremacy Clause. Arkansas could not prohibit the federal government from selecting its own employee.<sup>4</sup>

Direct conflict was also the basis of decision in *Paul*. California's minimum price law for milk was absolutely contrary to the federal requirement for competitive bidding. In this Court's words, federal policy "demands competition" while the California policy "effectively eliminates competition" (371 U.S. 253).<sup>5</sup> Even more significant to the case at bar is the fact that in *Paul* this Court distinguished and reaffirmed its decision in *Penn Dairies, Inc. v. Milk Control Commission*, 318 U.S. 261 (1943),

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4. Texas has never regulated employment practices, and no state law has been shown to conflict with the regulation relied upon by the NFIs.

5. There is no "demand" for competition in the regulation urged by the NFIs; Texas does not fix prices; and the evidence before the Court established that other than by attempting to purchase from out-of-state suppliers to avoid the Texas gallonage tax, NFIs made no effort to secure the lowest price available (III-R. 24, 26-28, 32, 129).

which had been decided under an earlier federal regulation reconcilable with state law.<sup>6</sup> *Penn Dairies* involved a purchase by the Army; the decision has not been overruled but instead was cited in *Hancock v. Train*, 426 U.S. 167 (1976), as authority for the proposition that the Supremacy Clause does not bar all state regulation which may touch the activities of the federal government (426 U.S. 179). Clearly *Penn Dairies* is contrary to Respondent's contention that the Supremacy Clause frees all military procurement from state regulation.<sup>7</sup>

On the general proposition of preemption by federal regulation, Respondent cites *Fidelity Federal Savings and Loan Association v. de la Cuesta*, \_\_\_\_ U.S. \_\_\_\_, 102 S.Ct. 3014 (1982), but because of the marked contrast between the regulation there involved and the one relied upon by NFIs here, the decision provides no support for Respondent's position. As this Court pointed out, the savings and loan board in its preamble to the regulation "explained its intent that the due-on-sale practices of federal savings and loan be governed 'exclusively by Federal law'" (102 S.Ct. 3019). On the basis of that language it was concluded "that the Board's due-on-sale regulation was meant to preempt conflicting state limitations on due-on-sale practices" (102 S.Ct. 3025). Particular emphasis is placed throughout on the use of the word "exclusively." The regulation relied upon by NFIs is titled "Cooperation" and opens with the directive that "DOD will cooperate

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6. The regulation relied upon by the NFIs is comparable with that in *Penn Dairies*, which is discussed by Petitioners in No. 82-2013 (see particularly No. 82-2013, Pet. 24, 29-30).

7. The same is true of *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964), which was based on sales to military bases and which was cited with approval and distinguished in *United States v. State Tax Commission of Mississippi*, 421 U.S. 599 (1975).

with all duly constituted regulatory officials (local, State and Federal)" (Pet. 3).

Much closer in point is *Rice v. Rehner*, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 3291 (1983), where this Court refused to find preemption by either federal or tribal law and held that California could require a federally licensed Indian trader to secure a state license for retail sale of distilled spirits on an Indian reservation. The final ruling was that the application of state law does "not interfere with federal policies concerning reservations" (103 S.Ct. 3303).

**RESPONDENT HAS IN EFFECT CONCEDED  
THE MERIT OF THE REASONS INITIALLY  
URGED FOR GRANTING THE WRIT.**

To avoid admitting conflict with *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964), Respondent characterized that case as involving only the tax immunity doctrine and conceded that Texas can constitutionally collect the gallonage tax with respect to purchases made by NFIs (Brief, 8). Respondent must have agreed also with this Petitioner's construction of *United States v. State Tax Commission of Mississippi*, 421 U.S. 599 (1975), as a tax case holding the tax to be unconstitutional because the legal incidence fell on federal instrumentalities. Respondent cites the case as showing "federal government immune from taxation" (Brief, 7).

The decision below, however, was clearly based on the Mississippi situation (Pet. App. A11-A14). Respondent does not dispute the extensive discussion of the facts and holdings in the cases but has attempted to provide explanation by asserting that under the heading, "Exclusive Zone of Federal Jurisdiction," the court below was "re-

ferring to subject matters of exclusive federal concern (such as federal military procurement) and not to matters of geography" (Brief, 5-6, fn. 6). The court below used no language to indicate such a concept, and Respondent has not even attempted an explanation for the asserted "exclusive federal concern" that military employees be able to purchase alcoholic beverages at lower prices than other citizens.<sup>8</sup>

Moreover, the opinion itself refutes the interpretation which Respondent purports to place upon it. Under the heading EXCLUSIVE ZONE OF FEDERAL JURISDICTION, the initial paragraphs explain and limit an earlier decision of the court.<sup>9</sup> The remainder of the opinion is devoted entirely to discussion of federal enclaves and to decisions involving concurrent or exclusive jurisdiction over federal enclaves.<sup>10</sup> The constitutional provision authorizing federal enclaves, Article I, Section 8, Clause 17, is cited and quoted in its entirety (Pet. App. A11, fn. 8).<sup>11</sup>

Military procurement—the topic which Respondent asserts the court below was treating—is not even mentioned

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8. This Court refused to apply the Supremacy Clause to grant a comparable preferential treatment to employees of the Forest Service, *United States v. County of Fresno*, 429 U.S. 452 (1977), and in *Washington v. United States*, discussed above, held that the Supremacy Clause prevents only discrimination against federal employees. "The state does not discriminate against the Federal Government unless it treats someone else better than it treats them" (103 S.Ct. 1350).

9. *Castlewood International Corporation v. Simon*, 596 F.2d 638 (5th Cir. 1979), cert. granted, 446 U.S. 949, j'ment vacated and remanded, 626 F.2d 1200 (5th Cir. 1980) (Pet. App. A8-A10).

10. The terms "federal enclave" or "enclave" with obviously the same intended meaning, are used, in either the singular or the plural, a total of seven times (Pet. App. A10-A14).

11. The court below did not even refer to the war powers listed in Article I, Section 8 cited and quoted by Respondent (Brief, 5, fn.5).

except in connection with the Mississippi cases where it had been established that either "concurrent" or "exclusive" federal jurisdiction existed over military "enclaves." Respondent asserts, however, that the Court of Appeals "specifically stated" that its decision was "unaffected" by the concepts of "concurrent" or "exclusive" federal jurisdiction<sup>12</sup> and that the court "discussed geography in the context of rejecting Petitioners' claim that the grant of authority in the Twenty-first Amendment . . . includes authority to regulate liquor distribution to a federal enclave" (Brief, 5-6, fn. 6).

The explanation is necessarily futile because even if accepted it establishes that the court below decided an issue by assuming facts for which there is no record support. As Petitioner has previously pointed out (Pet. 9-10), there is no evidence of either "concurrent" or "exclusive" jurisdiction over any base in Texas. The court below may have presumed that either one or the other

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12. Petitioner does not agree. The words of the court at the cited point are (Pet. App. A11, fn.8):

"The record reveals some doubt as to whether the military installations here are subject to concurrent or exclusive jurisdiction. Because of the Supreme Court's decisions in *Tax Commission, supra*, and *Tax Commission (II)*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975), we believe the present issues are unaffected by such distinctions since there is no contention that the state has reserved the right to regulate alcoholic beverages on those enclaves subject to concurrent jurisdiction."

That statement in no way contradicts but is instead entirely consistent with the earlier declaration that (Pet. App. A4, fn.1):

"Because our analysis turns on the proposition that the state may not, in any manner, regulate the distribution or consumption of alcoholic beverages on a federal enclave in the absence of an agreement between it and the federal government, we find no need to pass on the validity of these arguments [arguments with regard to the legal incidence of the Texas gallonege tax]."

Both of the above statements clearly refer to the Mississippi tax cases which Respondent has, in effect, conceded could not properly have been followed in the case at bar.

necessarily exists, but in *Paul v. United States*, a decision specifically urged by Respondent, this Court expressly held that the federal government's possession can be "simply that of an ordinary proprietor" (371 U.S. 245, 264).

The entire federal enclave concept was originated by the Court of Appeals. Respondent never attempted to establish federal jurisdiction, and Petitioners never claimed any right with regard to a federal enclave. Respondent urged the Supremacy Clause as conferring immunity from state regulation on nonresident sellers who might sell to NFIs. Petitioners relied upon the Twenty-first Amendment as granting to the state the right to regulate those suppliers of liquor for importation into Texas who might qualify to do so by securing nonresident seller's permits.

The brief in opposition provides no basis for denial of writ but instead augments and emphasizes the reasons for granting writ.

For the reasons originally set forth as well as those presented in this reply, Petitioner Licensed Beverage Distributors Association prays that its petition for writ of certiorari be granted.

Respectfully submitted

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## CERTIFICATE OF SERVICE

I, Mary Joe Carroll, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Reply to Brief of the United States in Opposition on counsel for Respondent by depositing same in the United States mail, postage prepaid, addressed to:

Mr. Rex. E. Lee, Solicitor General  
Mr. Glenn L. Archer, Jr.,  
Assistant Attorney General  
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Washington, D.C. 20530

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